REPORTS

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

By NORMAN L. FREEMAN,
REPORTER.

VOLUME XLIX.

CONTAINING THE REMAINING CASES DECIDED AT THE SEPTEMBER TERM, 1868, SOME OMITTED CASES DECIDED AT THE APRIL TERM, 1863, AND SEPTEMBER TERM, 1867, AND A PART OF THE CASES DECIDED AT THE JANUARY TERM, 1869.

PRINTED FOR THE REPORTER,

SPRINGFIELD:
1870.

JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.*

HON. SIDNEY BREESE, CHIEF JUSTICE.

HON. CHARLES B. LAWRENCE, } JUSTICES.
HON. PINKNEY H. WALKER, }

ATTORNEYS GENERAL,†

ROBERT G. INGERSOLL, ESQ.
WASHINGTON BUSHNELL, ESQ.

CLERK IN THE FIRST GRAND DIVISION,

R. A. D. WILBANKS, Mt. Vernon.

CLERK IN THE SECOND GRAND DIVISION,

WILLIAM A. TURNEY, Springfield.

CLERK IN THE THIRD GRAND DIVISION,

WOODBURY M. TAYLOR, Ottawa.

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*In the case of Phillips *v.* Phillips, p. 437, decided at the April term, 1863, the opinion was delivered by Mr. CHIEF JUSTICE CATON.

†At the election held on the 3d day of November, 1868, WASHINGTON BUSHNELL, Esq., was elected Attorney General, Mr. INGERSOLL's term then expiring.

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CASES

IN THE

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

SEPTEMBER TERM, 1868.

RALPH S. NORRIS and HIRAM W. FOLTZ

v.

BENJAMIN O. TAYLOE.

1. AGENCY—*liabilities of agent to principal—agent in treating with principal—must disclose all things connected with his agency.* Where a party accepts the position of an agent to take charge of the lands of his principal, collect the rents and royalty, and pay the taxes, a fiduciary and confidential relation is thereby created in regard to everything relating to such lands; and in treating with his principal for the property, the agent is bound to make the fullest disclosure of all matters connected therewith, within his knowledge, which it is important for his principal to know, in order to treat understandingly.

2. SAME—*concealment of facts by an agent—avoids the sale.* And when an agent, occupying such a relation to his principal, purchases the property at a

greatly inadequate price, by concealment of facts and information, relating thereto, which he was bound to disclose, the sale will be set aside.

3. SAME—*of a party purchasing from the agent with knowledge of the agent's fraud.* And when a party purchases from the agent, a portion of the property so purchased from the principal, with full knowledge of the transactions between the agent and his principal, the sale cannot be sustained.

APPEAL from the Circuit Court of Jo Daviess county; the Hon. BENJAMIN R. SHELDON, Judge, presiding.

This was a bill in chancery, filed in the court below by the appellee, against the appellants, to set aside two deeds, one made and executed by appellee to the appellant, Norris, for certain lands situated in Jo Daviess county, and the other made and executed by the appellant, Norris, to his co-appellant, Foltz, for an undivided half of the same lands, and also for an accounting as to the mineral rents and mineral taken from the lands, both before and after the conveyance to Norris. The bill alleges that appellant, Norris, was the agent of appellee in the management of these lands, and that in his negotiations for the purchase of the same, he did not make such disclosures in reference to the value thereof, as it was his duty to have done, he occupying a fiduciary relation to appellee, and thereby procured the same at a greatly inadequate price. The court below rendered a decree in favor of the complainant, and the defendant appealed to this court. The further facts in this case are stated in the opinion.

Mr. E. A. SMALL, for the appellants.

Mr. D. W. JACKSON, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

Unless it is established that Varnell, in this transaction, was the agent of appellant, Norris, this decree cannot stand, and to that we have principally directed our attention.

What was the position of these parties? Tayloe, the owner of the land purchased for him by Varnell, was a non-resident, had never seen the land, and knew nothing about it, save through Varnell's statements. Varnell became, thereafter, Tayloe's agent, and in answer to the question, "What was the scope of your agency?" he answered, that the list of lands was placed in his hands by Tayloe himself, for the purpose of seeing that the taxes were paid from year to year; that he also had a general supervision, to see that the lands were not trespassed upon, and for this purpose he was empowered by Tayloe to employ other parties in other counties.

On a visit to these lands in the latter part of the Spring of 1863, with appellant, Norris, he adjusted some difficulties that had arisen between the miners on the land, and made arrangements with Norris to pay the taxes and look after the land. At this time there were several parties digging and prospecting on the land when he was there. Norris himself was then there, digging for lead ore. Varnell left the lands in charge of Norris, authorizing him to take general supervision of them, and collect the rents as they might accrue. He gave no special power to Norris to grant leases, but told the parties, in the presence of Norris, upon the ground, that he, Norris, would have charge and control of the land.

Varnell spent two or three days while on this visit, at the residence of Norris, at Galena, and in the mines, during which, Norris proposed to purchase the lands for one thousand dollars, and in addition to that, he proposed to purchase jointly with Varnell, which Varnell declined on the ground he had no money, upon which, Norris proposed to advance the money, charging Varnell interest upon it until he could repay it. Varnell proposed then to investigate the matter, and after seeing Tayloe, at Washington City, the matter was then dropped. He afterwards received a letter from Norris, relating to the same subject.

What followed these preliminaries, is found in the letters in the record. The first is the letter from Varnell to Norris, dated Mt. Vernon, Feb. 12, 1866, in which Varnell asks Norris if he will attend to the taxes of 1865 on this land, and asks him how he progresses with the lead mines; asks him what he will give for the land, and then says: "I think I can buy it at a reasonable rate for you, or any one that may want. Please let me hear from you as soon as possible."

Here was a plain proposition to Norris, by Varnell, to become Norris' agent to buy this land. Was this offer accepted by Norris? On the 15th of February, Varnell writes to Norris for an offer for the whole tract, having before enclosed him Foltz's letter proposing to purchase the "forty." He says, Norris shall have the refusal, and wants him to be liberal, and offer at once every dollar he feels like giving for the whole tract, and trusts he can make a big strike and get thousands of dollars worth from it, and then asks, merely for his personal gratification, how much mineral has been taken from the land since the first digging commenced.

On the 14th of March, Norris answered this letter, and proposed to give two thousand dollars for the land and the accrued rents, which then amounted to more than eight hundred dollars, but which he represented at four or six hundred dollars, though no doubt innocently.

To this, on the 23d of March, Varnell responded by letter from Washington City, that the proposition is accepted. He asks Norris to send him the names of the parties, and the exact description of the land, and when he returns to this State, on the 10th of April, he will bring the deed with him, all right, duly executed, ready for delivery, and tells Norris he can go on as there will be no difficulty.

On the 3d of April, 1866, Varnell again writes Norris from Washington City, acknowledging receipt of a letter of March 27, from Norris, containing a description of the lands, and says he will send on the deed as directed in a few days—that

Mrs. Tayloe was sick, but would be all right in a day or so. He further says he has put the consideration at $1,500, being the amount at which Norris valued the land, and says he had authority to sell at $1,500, but "the amount I make I desire no one to know." He says he will be in Virginia until Saturday, when he will start the deed, which will be ready by that time; is glad Norris gets the land, and truly hopes he may do well with it. In a *nota bene* to this letter, he says: "I said nothing to Mr. T. (Tayloe) especially of the late strike. Don't think he would have sold if I did, but I really don't deem it of any great importance. We have spent a good deal on the land, and ought to make something out of it. Though he authorised me to sell at $1,500, if he knew I obtained $2,000 he might not feel kindly about it. I have had considerable trouble and loss of time with, and ought to make something out of it, and do not deem the transaction otherwise than as perfectly fair. I would be willing to give the price for the land myself, but I know he would not sell to me."

There is nothing appearing in the record to show that Varnell was the agent of Tayloe to bargain away this land, except Varnell's statement in the above letter, nor did he, as this correspondence shows, act as such, but as the agent of Norris to purchase the land for him, he, Varnell, having volunteered to be such agent, as is shown by his letter of February 12, 1866. He was not Tayloe's agent to sell, but had a supervisory control over the lands, as stated by him in his deposition. The same position was occupied by Norris. He had full charge of the land, and granted privileges in it, and to that extent was the agent of Tayloe. Norris well knew Varnell was not the agent to sell the land, but he made him his agent to purchase.

What, then, was Varnell's duty under the circumstances? Standing in a *quasi* confidential relation to Tayloe, and at the same time an agent of Norris to purchase valuable property which Tayloe had entrusted to him, it seems one of the plainest dictates of justice and honesty, that Varnell, when

negotiating with Tayloe to purchase the property, should have communicated to him all the knowledge he possessed, by the letters of Norris, of the supposed mineral wealth of the land, all of which he studiously withheld, believing, as he says, "it was a matter of no great importance."

At the time the letter of March 14, by Norris to Varnell was written, proposing to give $2,000 for the land, the survey, which determined most important interests, had not been made, but it was made by the county surveyor about the middle of March, or a few days after the letter of the 14th. That survey developed the fact that a rich lode, not before certainly known to be on that land, was in fact on it, greatly enhancing its value, and even when the letter was written, sufficient developments had been made to justify the belief that the tract contained rich diggings, as in the months of January up to the 23d of March, about 90,000 pounds of mineral, and up to April 1st, about 140,000 pounds were raised on it, so that it is very evident, the realities and the prospect together made the land immensely more valuable than the price offered and received, and these facts were known only to one of the contracting parties, Norris, and he acting and standing in a fiduciary relation to the owner, of whom, through Varnell, he purchased at a greatly inadequate price, which, on Varnell's own admission, Tayloe would not have accepted had he known the true state of the facts.

We cannot but think it was Norris' duty, before he permitted his offer of March 14 to go before Mr. Tayloe, to have communicated, fully, the result of the survey which was then in the process of execution, and which he could have done in his letter of March 27. By accepting the position of an agent to take charge of this land, collect the rents and royalty, and pay the taxes, a fiduciary relation was thus created in regard to whatever related to the land. Confidence was reposed that he would act in all things for the interests of his constituent. Good faith required he should have communicated these

important facts, developed by the survey, before he permitted his constituent to sell. But even that which was certainly known, that it was mineral land with flattering prospects, was not communicated by Varnell, his agent, to Tayloe, their common constituent.

As for the other appellant, Foltz, it is very evident he had full knowledge of what was going on. Substantially he was a party with Norris in purchasing.

We fail to perceive any error in the record, and must affirm the decree.

Decree affirmed.

DANIEL PIERCE

v.

MARY C. HASBROUCK.

1. CHATTEL MORTGAGES—*parol agreement to extend the time of payment—founded on a valuable consideration—binding on the parties.* H and wife executed to P a chattel mortgage upon four horses, two sets of harness and a wagon, to secure a note for $300, given by H to P. Before the mortgage matured, the mortgagor let P have one pair of the horses to apply thereon at $280, the price being $300, a deduction of $20 from the price being made in consideration of an agreement by P to extend the time of the payment of the balance of the debt from two to three months. Before the expiration of two months after the maturity of the mortgage, P took possession of the other span of horses, harness and a wagon, and thereupon, the wife of H tendered to P the balance due upon the debt, and demanded a return of the property, which was refused. *Held*, in an action of trover, brought by the wife against P, that the agreement to extend the time of payment of the mortgage, was for a valuable consideration, and was binding upon the parties.

2. INSTRUCTIONS—*when not well expressed.* This court will not reverse a judgment merely because an instruction is not well expressed, and is awkward in

construction, where its true meaning is apparent, and could not have been mistaken by the jury.

3. EVIDENCE—*inadmissible.* And in such case, evidence for the purpose of showing that the plaintiff's claim of title to the property was in fraud of her husband's creditors, is inadmissible, such proof being wholly immaterial.

4. The plaintiff's ownership of the property, which had been sworn to by her husband, could not be impeached in that mode.

5. SAME—*declaration by the husband.* Nor could the right of the plaintiff to the ownership be prejudiced by the declaration of her husband, made out of her presence.

6. SAME—*presumption of ownership—from possession.* Nor can any presumption of ownership by the husband, be drawn from the fact that the property was in his possession, the proof clearly showing, that he used it simply in cultivating the farm occupied by himself and wife, the plaintiff.

7. VERDICT—*power of court over—judgment may be entered upon at subsequent term.* Where parties stipulated in open court, that the jury might seal their verdict, deposit it with the clerk and then separate, such delivery is equivalent to a delivery in open court, and the power of the court to open and act upon it at a subsequent term is unquestionable.

8. SAME—*agreement to open on a particular day.* Nor is the authority of the court so to act, at all lessened because of an agreement by the parties, that such verdict should be opened on a particular day of the term at which it was rendered. The court, nevertheless, may open and act upon it on any other day.

APPEAL from the Circuit Court of De Kalb county; the Hon. THEODORE D. MURPHY, Judge, presiding.

This was an action of trover, brought by the appellee, Mary C. Hasbrouck, in the court below, against the appellant, Daniel Pierce, and tried at the February term, 1866, of said court, and which trial resulted in a verdict for the plaintiff. A motion for a new trial was made, which the court overruled, and rendered judgment on the verdict, to reverse which, the cause is brought to this court by appeal. The further facts in the case are stated in the opinion.

Mr. R. L. DIVINE, for the appellant.

Mr. CHARLES KELLUM and Mr. B. F. PARKS, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

Hasbrouck and wife delivered to Pierce a mortgage upon four horses, two sets of harness, and a wagon, to secure the payment of a note for $300, held by the latter against Hasbrouck. Before the mortgage matured, the mortgagors let Pierce have a span of horses to apply thereon at $280. The plaintiff claims that the price of the horses was $300, but that they deducted $20 from the price, in consideration of an agreement by Pierce to extend the time for the payment of the residue of the debt from two to three months. This agreement is denied by the defendant.

Before the expiration of two months after the maturity of the mortgage, Pierce took possession of another pair of horses, harness and a wagon, under the mortgage, and thereupon the plaintiff, Mrs. Hasbrouck, having tendered to Pierce $55, admitted to be the balance due upon the note, demanded a return of the property. This was refused, and she brought this action of trover.

It is manifest, the action turns upon whether there was a valid extension of time upon the mortgage, that is, an agreement to extend for a valuable consideration. If the mortgagors abated $20 from the price of the first pair of horses, in consideration of such an agreement to extend, the consideration would be valuable and the agreement binding. This was the question submitted to the jury by the second instruction for the plaintiff, and though that instruction was carelessly drawn, and is awkward in its construction, it can hardly have misled the jury. They must have understood, from the course of the evidence, that this was the question upon which the case hinged. We are not willing to reverse the judgment

merely because this instruction was not well expressed, as its true meaning can not have been mistaken.

It is also urged that the instruction in regard to the measure of damages is wrong, on the ground that if the plaintiff was only tenant in common with her husband, the damages should have been apportioned, instead of allowing the plaintiff to recover the full value of the property. But the evidence shows very clearly that there was no tenancy in common. The property belonged either wholly to the husband or wholly to the wife. The instruction, therefore, worked no harm. If the plaintiff was entitled to recover at all, she was entitled to recover the value of the property, and this was all that was contained in the instruction.

It is urged that certain evidence, offered for the purpose of showing the plaintiff's claim of title to this property was in fraud of her husband's creditors, should have been received. But we can see no grounds on which defendant could claim a right to raise that question. He had no interest in this property, except as mortgagee, and if the time of payment had been extended, his taking of the property was unlawful whether it belonged to the husband or the wife. Conceding that it might have been lawfully taken on an execution against the husband, the defendant did not so take it, and if he had the right to it under his mortgage, the right was unaffected by any question of ownership as between the two mortgagors. The evidence was, therefore, wholly immaterial. It is urged, however, that a plaintiff in trover can not recover unless he is the owner of the property. It is true, he must have either an absolute or qualified ownership, and, in the second instruction for the defendant, the court told the jury, in substance, that this plaintiff could not recover if the property in question belonged to her husband. It is unnecessary to decide whether this instruction was correct or not, in the special circumstances of this case, the defendant having acquired possession under a mortgage executed by the plaintiff with her husband. He

had the benefit of the instruction, whether right or wrong, and it is only necessary to say, in disposing of this branch of the case, that the evidence offered for the purpose of impeaching the alleged ownership of the wife, on the ground that it was fraudulent as to creditors, was not admissible. Her ownership, which was sworn to by the husband, could not be impeached in that mode.

The evidence offered to show that Hasbrouck had proposed to trade this property, and what he had said as to the ownership, was properly excluded. The rights of the wife could not be prejudiced by his declarations not made in her presence. So far as any inference of ownership was to be drawn from the possession of the horses, it was sufficiently proven that Hasbrouck used them in cultivating the farm.

Neither was there error in recording the verdict and pronouncing judgment at the May term. The parties had stipulated in open court, at the February term, that the jury might seal their verdict and deposit it in the hands of the officer to be delivered to the clerk, and that they might separate and not again return to court, it being the last day of their service, and the court being about to adjourn over Sunday. By the agreement, the verdict was to be opened on Monday, but a storm prevented the attendance of the judge, and on Tuesday the court adjourned for the term. At the next term the verdict was opened and recorded, and judgment was entered.

The parties having agreed that the sealed verdict should be delivered to the clerk, and the jury separate, such delivery was substantially the same thing as its delivery in open court. It was then under the control of the court, and the court could suspend its judgment until the next term, if it thought proper. The agreement that it was to be opened on Monday, can not be considered as taking away the power of the court to open and act upon it on another day.

We find no error in this record that would justify a reversal of the judgment.

Judgment affirmed.

FRANK SMITH

v.

JOHN ANDREWS *et al.*

1. PARTNERSHIP—*power of partner.* A partner cannot sell partnership property in payment of his individual debt, without the assent of his partner; to do so is a perversion of the firm property, and operates as a fraud upon the other partner. And for the same reason, one partner cannot mortgage the chattels of the firm to secure his individual debt, without the assent of his partner, so as to prevent the latter from having such property applied to the payment of the firm indebtedness.

2. Where a partner makes such a mortgage to secure such a debt, it does not operate as a mortgage on the interest of the maker in the property, as on its foreclosure the property would be diverted from the use of the firm, and would create a tenancy in common between his partner and the purchaser or holder under the mortgage. But it may be that if on the payment of the firm debts and a division of the assets of the firm, such property fell to the mortgagor, the mortgage would become operative and could be enforced. Such is the effect of a sale on execution of a partner's interest in the firm property.

APPEAL from the Court of Common Pleas of the City of Aurora; the Hon. RICHARD G. MONTONY, Judge, presiding.

The opinion states the case.

Messrs. WAGNER & CANFIELD, for the appellant.

Messrs. PARKS & ANNIS, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that Charles Wendling and Barnard Rholes were engaged as partners in carrying on the business of bakers in the city of Aurora. That Wendling being indebted to appellant, executed to him a chattel mortgage upon a mare and two covered peddling wagons, which were the property of

the firm. The mortgage was executed without the knowledge or consent of Rholes. Subsequently, R. A. Alexander, by John Chase, his agent, sued out a writ of attachment against the firm, for $540.20, because of the alleged fraud of the firm. Rholes turned out this, with other property of the firm, to be levied upon by the officer, who, under a special execution, sold it to pay the judgment of Alexander recovered in the attachment suit against Wendling & Rholes. Appellant, at the sale, gave notice of his mortgage, and forbid the sale. The officer, however, disregarded the notice, and sold the property.

It appears that the mortgage was executed on the 2d day of July, 1866, and the attachment was sued out on the 14th of the same month. Appellee, Andrews, was deputy sheriff, and made the levy and sale, and appellant brought this suit against him and Chase, to recover one-half the value of the property thus levied upon and sold, upon which Andrews held the mortgage. On the trial in the court below, the jury found a verdict for defendants, and plaintiff entered a motion for a new trial, which was overruled by the court, and judgment rendered upon the verdict.

It is only claimed that the mortgage covered an undivided one-half of the property described in it, although it purported to cover the title to the whole of it; and the question arises, whether any portion of the property, or any interest in it, was bound by that instrument. The doctrine is settled and fully recognized, that one partner cannot apply the property, money or funds of the firm, for the payment of his separate debt, without the consent of his co-partner. To do so is regarded a fraud upon his partner, and cannot be enforced. Nor can one partner set off his debt against one who owes the firm, and thus discharge the firm debtor from liability to the firm for its payment, without the consent of his co-partner. These rules are so plain and familiar, that they require the citation of no authority for their support.

If, then, it is a fraud upon a partner to apply firm property to pay his individual debt, without the consent of his co-partner, it must follow that to mortgage such property for the same purpose, in like manner, must be equally a fraud upon his partner. Where the law prohibits a sale for such a purpose, it must follow that it equally prohibits its being pledged or mortgaged for the security of a debt, to pay which it could not be sold. It is true, that a mortgage or pledge does not at once pass the title, but upon default it does pass title, and would be only another mode of effecting a sale. The reason of the rule prohibiting the sale, applies with equal force to the execution of such a mortgage.

Neither partner has the right to pervert partnership property from the purposes of the firm. He may use and employ it for all legitimate purposes of the firm, but may not withdraw or apply it to his individual uses. If he might sell an undivided interest in firm property to a third person, he would thereby create a tenancy in common between the purchaser and his co-partner, which would be inconsistent with the rights of the partnership to use it for the benefit of the firm. It would thereby withdraw it from the firm, and deprive the partners from using it for firm purposes, but would leave his partner and the purchaser to hold it jointly, but not as firm property. And as a foreclosure of the mortgage on the interest of the partner, would result in precisely the same consequences as would a sale, such an incumbrance is as fully within the reason of the rule as such a sale, and must, for that reason, be prohibited.

On a dissolution, and payment of all the firm debts and distribution of the surplus property of such co-partnership, if such property should fall to the mortgagor as his separate property, it might be that the mortgage could be enforced. Where an execution at law against one partner is levied on his partnership interest, it is not upon his interest in particular portions of the firm property, but upon his interest in the

firm. And if sold, all the purchaser acquires is the debtor's interest, if anything, which remains after the payment of all the firm debts, and the other partner has drawn out his share of the surplus.

Thus it will be seen, that a separate creditor of a partner cannot acquire any interest in the firm property, either by purchase from a single partner or by sale on legal process, that will deprive the other partner of his right to have the property applied to the use of the firm, nor will a sale by one partner, for his own use without the consent of the other, cut off firm creditors, or deprive them of the right to have the firm property first applied to the payment of their debts.

The judgment of the court below is affirmed.

Judgment affirmed.

ISRAEL B. HOLMES *et ux.*

v.

JOHN H. HOLMES.

STATUTE OF FRAUDS—*parol promise to give or lease lands for the life of another —not binding.* A parol promise, founded upon no consideration, made by the owner of lands, to give or lease the same to another for life, is void, being within the statute of frauds.

APPEAL from the Circuit Court of Winnebago county; the Hon. BENJAMIN R. SHELDON, Judge, presiding.

This case was before the court at the April term, 1867, and is reported in 44 Ill. 169, wherein a full statement of the facts will be found.

Messrs. LELAND & BLANCHARD, for the appellants.

Messrs. MARSH, BROWN & TAYLOR, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

This case was before this court at a former term, and is reported in 44 Ill. 169.

The complainant in that case claimed an equal interest in the fee of this land, the whole of which, undoubtedly, belonged to appellant, as this court found, and reversed the decree. In this case, complainant claims a lease for life of the east half of the quarter section, and it was decreed to him.

To reverse this decree, the defendant has brought the record here by appeal.

We have examined the evidence again, and find no fact, as the statute of frauds and perjuries was pleaded, to take the case out of the operation of that act. The land was appellant's, and his promise to give or lease to his father for life, any portion of it, was of no binding force. No consideration is shown, to support any such promise. For the improvements put upon the east half, appellee is more than compensated by its use, without rents, for many years.

We perceive no essential difference as to the points in the claim now set up for a lease for life, than in the previous case, wherein the fee was demanded. There is no equity in the claim to either, and the decree granting to appellee a lease for life in the east half, must be reversed, having no foundation in equity or justice.

The testimony of the parties was taken on this trial, but it does not so change the aspect of the case as to induce us to alter the views expressed in the opinion delivered when the case was first before us.

Every foot of this land being the property of appellant, he was under no legal obligation to convey to appellee one-half,

or to give him any interest, whatever, in it. Appellant did, at one time, offer appellee a lease for life of one-half, which was refused, and a suit instituted to compel the conveyance in fee of one-half. Failing in this the effort is now made to compel a lease for life. Originally the offer by appellant to execute a lease for life, was but an emanation of a generous filial sentiment, and of no binding force, and as it was refused, appellant occupying *locus pœnitentiæ*, had a right, thereafter, to refuse compliance, no valuable consideration existing for the original offer.

The decree must be reversed.

Decree reversed.

BETHOLD B. VINCENT *et al.*

v.

THE CHICAGO AND ALTON RAILROAD COMPANY.

1. RAILROAD COMPANIES—*required to deliver the goods to the consignee—at his place of business—when on the line of its track.* Under section 22 of the act of February, 1867, entitled "Warehousemen," railroad companies are positively inhibited from making delivery of any grain which they have received for transportation, into any warehouse other than that into which it is consigned, without the consent of the owner or consignee thereof.

2. SAME—*of the rule at common law.* And independent of the statute, the duty to make a personal delivery to the consignee, in cases where such delivery is practicable, is required by the common law.

3. SAME—*rule relaxed as to railroad companies.* And the common law rule, requiring common carriers by land to make personal delivery to the consignee, has been so far relaxed as regards railways, *from necessity*, as in most cases to substitute, in place of personal delivery, a delivery at the warehouse of the company. But this is upon the ground that a railway has no means of delivery beyond its own lines.

4. SAME—*cases where personal delivery is required.* And in cases where a shipment of grain is made to a party having his warehouse on the line of the road by which the grain is transported, and such consignee is ready to receive it, it is the duty of the carrier to make a personal delivery to him, at the warehouse to which it is consigned.

5. In cases of this character, the rule of the common law must be applied in its full force, the *necessity* not arising for its relaxation.

6. SAME—*what points are to be considered as on the line of a railway for the purposes of personal delivery.* Where the owner of adjacent property to a railway company had, with the consent of the company, for a valid consideration, been permitted to lay down a side track, connecting with the track of the company, for the purpose of transporting to such property articles of freight, and such owner has erected thereon a warehouse, which is in readiness for the receipt of such freight, such side track is to be considered as a part of the line of the company, for the purposes of delivery under this statute.

7. SAME—*in what cases only—the company will be excused from delivery.* In such cases, a personal delivery must be made at a warehouse on the line of such side track, the same as if the warehouse stood upon a side track owned by the company, and the company have the right to send its cars over such track for the purposes of delivery, until forbidden by the owner, when it will be excused from delivery.

8. CHANCERY—*courts of will interfere to restrain.* And in such case, where the carrier refuses to make a personal delivery to the consignee, the party injured is not confined to the statutory redress; the right created not being a new one, nor the remedy provided adequate, he may resort to the restraining powers of a court of chancery, to prevent an injury to his business which might ensue, and which could not be compensated for at law.

9. RAILROAD COMPANIES—*as to discriminating charges.* A railroad company, although permitted to establish its rates of transportation, must do so without injurious discrimination as to individuals.

10. And when it has fixed its rates for the transportation of grain, from any given station, on the line of its road, to Chicago, it will not be permitted, on the grain being taken there, to charge one rate for delivery at the warehouse of one person, and a different rate for delivery at that of another, both warehouses being upon its line or side tracks.

11. SAME—*delivery must be made to the warehouse to which the freight has been consigned.* And where the company takes grain consigned to Chicago, its duty is to deliver it in Chicago, at any warehouse, upon its lines or side tracks, to which it has been consigned.

APPEAL from the Superior Court of Chicago.

The opinion states the case.

Mr. J. D. CATON, Messrs. WILLIAMS & THOMPSON and Mr. EMERY A. STORRS, for the appellants.

Messrs. WALKER & DEXTER, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was a bill for an injunction, brought by the appellants, against the appellee. The defendant demurred to the bill. The motion for an injunction and the demurrer were heard at the same time. The demurrer was sustained and the bill dismissed, whereupon the complainants appealed.

The substance of the bill is briefly and correctly stated in one of the arguments for appellants, as follows:

"The complainants own and occupy a warehouse in the city of Chicago, known as the National Elevator, situated upon the line of the defendant's railroad, and connected with it by a side track about one hundred and fifty feet in length, and situated two blocks from the freight depot, and between that and the passenger depot. The warehouse is provided with all the ordinary machinery and conveniences for the handling of grain in bulk; and the owners had established, and, up to the time of the acts complained of in the bill, were conducting a large and profitable business as warehousemen. The greater part of the business of the complainants consisted in the storing and the transfer of grain which was transported over the defendant's road, and up to about the 1st day of May last, the defendant had delivered to the complainants all the grain consigned to them, without objection.

The side track connecting the defendant's road with the complainants' warehouse was constructed under the following circumstances: The grantors of the complainants then being

the owners of the lot upon which the warehouse is situated, and through which the road of the defendant passes, on the 18th of September, 1860, conveyed to the Pittsburg, Fort Wayne & Chicago Railway a strip of land through the lot, to be used by the railroad company as a right of way, the grant being subject to the following, among other, conditions: 'That said railroad company shall, when required, construct on and for the use of the owners of said lot two (2), in block seventy (70), free of charge, a side track and switches, in all respects equal to those used by the company.' This agreement was recorded, and the defendant had notice of the conditions. Subsequently the Pittsburg, Fort Wayne & Chicago Railway conveyed an undivided half of its right of way to the Joliet & Chicago Railroad, of which the defendant's railroad is the successor, and the right of way is now jointly owned and used by the Pittsburg, Fort Wayne & Chicago Railway and the defendant.

On or about May 6, 1868, the defendant began to refuse to deliver into the complainants' warehouse the grain consigned to it, although received by the defendant with proper directions as to its delivery, and to deliver all grain transported over its road into the warehouse of Munn & Scott, even when consigned by the shipper to the National Elevator; and on the 28th of April, 1868, the defendant issued the following notice:

CHICAGO & ALTON RAILROAD,
GENERAL FREIGHT AGENT'S OFFICE,
CHICAGO, April 28th, 1868.

To AGENTS:

On and after May 11th, and until further notice, grain may be consigned to the National Elevator, Chicago, if shippers so order, at an additional charge of five dollars per car, for delivery of cars at elevator, on all grain so consigned. Agents will add five dollars per car to our charges on the way bill.

All unconsigned bulk grain will be delivered to the Union Elevator, as heretofore. Please notify shippers.

T. B. BLACKSTONE,
President and General Superintendent.

JAMES SMITH, *General Freight Agent.*

After May 11th, and up to the time of filing the bill, the defendant has, in some instances, refused to deliver to the complainants the grain consigned to them, and this absolutely and irrespective of charges, and in other cases has refused to deliver them grain, except upon the payment by the shipper of five dollars per car, in addition to the regular charges for freight.

It is alleged in the bill, that the complainants' warehouse is as conveniently situated, with reference to the delivery of cars into it, as any of the elevators or other private business places in the city; that it is the uniform custom for railroads to deliver freight into such places free of charge; and if such delivery is a proper subject of charge, that five dollars per car is excessive and extortionate, and wholly disproportionate to the service rendered. It is also alleged, that the acts of the defendant cause an irreparable injury to the complainants, and that the defendant threatens to continue them. The bill concludes with a prayer that the defendant be restrained from delivering cars of grain, consigned to the complainants, to the warehouse of Munn & Scott, or any other place except as consigned; and also from imposing the charge of five dollars per car for delivery at elevator, or any other excessive charge."

The demurrer admits the statements of the bill to be true.

It will be seen, from the foregoing abstract of the bill, that the questions presented by this record in brief are, whether the appellants have a legal right to insist upon a delivery, at their elevator or warehouse, of grain consigned to them,

without discriminating charges against them, such warehouse being connected with the line of the railway in the manner above stated, and, if they have such right, whether the powers of a court of chancery can be invoked to protect it.

The rule of the common law, requiring common carriers by land to deliver to the consignee, has been so far relaxed in regard to railways, from necessity, as, in most cases, to substitute, in place of personal delivery, a delivery at the warehouse or depot provided by the companies for the storage of goods. It has repeatedly been held by this court, that a railway company may discharge itself of its liability, as a common carrier, by safely depositing goods in its warehouse, and there holding them, under the responsibilities of a warehouseman, until demanded by the consignee. These decisions proceed upon the ground that a railway has no means of delivery beyond its own lines. But the question presented by this record is of a different character.

There are some facts connected with the vast internal commerce of this State, of which, independent of any averments in the bill, we will take judicial notice. The immense quantities of grain which are annually transported to Chicago over our lines of railways, making that city, with the aid of contributions from neighboring States, one of the great grain markets of the world, are chiefly sent in bulk. The grain is ordinarily consigned to commission merchants who have erected vast warehouses, termed elevators, connected by side tracks with the main line of some railway, and provided with machinery for the rapid unloading of the cars, and storage of the grain. As the grain is of various grades and prices, it is of great importance to the agricultural and mercantile interests of the State that each shipment of grain should be stored by itself, or with grain of the same grade, and that every shipper should be able to select his own consignee, with the certainty that, if his elevator is on the line of the road by which the grain is transported, and the consignee is ready to receive the

shipment, it shall be faithfully delivered to him. This arrangement is as advantageous to the railways as it is to the consignor and consignee. It would obviously be impossible for the companies to unload and store this grain at their ordinary freight depots, to be there held, unmixed with other grain, subject to the order of the consignees, without incurring great additional expense, and they would hardly claim the right, under their charters, to erect elevators of their own, for the purpose of adding the business of commission merchants to that of common carriers. If they were to do so, the tendency of such a practice to create a dangerous monopoly, would probably soon arrest the attention of the legislature, and lead to its prohibition.

The custom of delivering grain at the elevators to which it is consigned, and which are connected with the line by convenient side tracks, has thus grown into one of the necessities of railway commerce, and the bill before us avers it is a custom from which no railway company has sought to depart, except the present appellee.

If, then, the common law rule requiring of common carriers an immediate delivery, when practicable, to the consignees, has been relaxed, in regard to railways, only from necessity, it is difficult to perceive why the rule should not be applied, in its full force, to transportation of this character. Here the necessity of relaxation has not only ceased, but the railway is compelled to seek some other warehouse than its own freight depot, and to send its cars, over a side track, to some private elevator. And where there are several elevators thus connected with the main line, in substantially the same mode, it is difficult to conceive how, as a question merely of common law, the railway company can be permitted to deliver grain to an elevator of its own selection, in place of that to which the property has been consigned.

The legislature, however, has made this matter a subject of legislation, and thereby placed this question beyond all

controversy. Section 22 of the act entitled "Warehousemen," passed February 16, 1867, contains the following provision:

"It shall be unlawful for any railroad or railway company to deliver any grain into any warehouse other than that into which it is consigned, without the consent of the owner or consignee thereof; and it shall be the duty of said party or parties, at the time of shipment of said grain, or before it reaches its destination, to give notice to the railroad or railway company by card, on the car or otherwise, of the warehouse into which said grain is to be delivered; and for the failure to deliver the grain according to the direction of the owner or consignee thereof, such railroad or railway company shall be liable to the warehouseman to whom the same should have been delivered, for two months' storage of all such grain so consigned or refused, and also to such warehousemen, and to the owners of such grain, for all other damages either of them may have sustained by reason of such refusal or neglect of said railroad or railway company, including all lawful expenses incurred by him or them in the prosecution of any suit or suits against such railroad or railway company to recover the penalties, or enforce the provisions of this act." Laws of 1867, p. 181.

If, under the common law, there could be any doubt in regard to the duties of railway companies in cases of this character, this statute sets them at rest. So far, however, as concerns the duty to deliver to the warehouse to which the grain has been consigned, where such delivery is practicable, it is really but declaratory of the common law, and is new only in the additional remedies it gives to secure the performance of the obligation. As to what that obligation is, it certainly leaves no room for controversy.

It is urged, however, by the counsel for the company, that this act does not mean that railway corporations shall deliver grain at points off their line. Clearly it does not; but the question recurs, what points are to be considered as on the line of a railway for the purposes of delivery under this law? As to this, we differ from the counsel of appellee. They contend that its line consists only of its main track and such side tracks as belong to it. For most purposes this is undoubtedly true, but not in reference to their duties under this statute. A railway company can unquestionably refuse to allow the owner of adjacent property to lay down a side track connecting with its own rails, but when, for a valid consideration, it has once conceded that right, and, as in the case before us, has permitted the connection to be made, and the side track to be laid, for the use of a particular lot of ground, and in order to transport to such lot heavy articles of freight, and the owner of such lot and side track has his warehouse in readiness for the receipt of such freight, then, we say, that such side track is to be considered as a part of its line for the purposes of delivery under this statute. There is no reason why it should not be so regarded as much as if the elevator stood upon a side track belonging to the railway itself. What difference does it make to the company who owns the ground, or who has laid the rails? Can it not deliver a car load of wheat with the same convenience whether the side track belongs to itself or to some other person with whom it has bargained the track may be laid? And when we thus speak of equality of convenience, we are to bear in mind that railways have been excused from delivery to consignees only on the ground of impossibility, and not as a matter of convenience. Counsel say the company has no right upon such a side track except by permission of the owner. As well might it be said that a common carrier by wagon had no right to drive through the gateway of the consignee for the purpose of delivering goods, and he was therefore to be excused for

non-delivery. After the track has been laid for the purpose of receiving freight, the company has a right to send its cars there for the purpose of delivery, until forbidden by the owner. When that is done, the company will be excused from delivery.

There is no pretence for saying the legislature, in enacting this statute, had in view only grain warehouses erected upon the land of the railway companies. If there be such warehouses in Chicago, they would stand in little need of an act of the legislature for their protection. The legislature had its eyes turned in the opposite direction. Its evident object was to prevent the growth of those injurious monopolies in the grain trade, which would almost necessarily spring from the toleration of such a practice as that which these appellants seek to enjoin. To do this, it was necessary to secure to every warehouseman, whose warehouse was connected by a side track with a railway, the right to a delivery of all grain consigned to him.

What we have said sufficiently disposes of the point made by counsel as to the constitutionality of the act of the legislature. It may be conceded that a railway company can not be required, by legislative enactment, to transport freight beyond its own line, but that this act is valid, as to warehouses upon the line, is not denied by counsel, and such we hold the warehouse of appellants to be.

Neither is it necessary to consider the import of the contract between the appellants and the Pittsburg, Fort Wayne & Chicago Railway, or how far it is binding on the appellee as a remote grantee. It is sufficient that the appellants' elevator is connected with the main line by a side track, and that the connection was made for a valuable consideration with the consent of the company then owning the road. It is not pretended that the appellee has a right to destroy it, in order to excuse itself from the performance of a duty.

But it is contended, finally, that even admitting the complainants have been wronged by the appellee, their only remedy is by action for the two months' storage and damages authorized by the statute. Various authorities are cited for the purpose of showing that where a new right has been created, and an adequate remedy for its invasion provided by the same statute, parties injured are confined to the statutory redress. This is doubtless true; but in this case the right is not new, nor is the remedy adequate. A new and enlarged remedy is given, but the right of the consignee to delivery is as old as the common law. The right, in this case, to resort to the restraining powers of a court of chancery, springs from the fact that the course pursued by the company will destroy or greatly injure the business of the appellants. This is evident, for if the tax of five dollars per car is charged by them to their correspondents, they would soon cease to receive shipments of grain, and if paid by themselves, they would be placed at a ruinous disadvantage in comparison with their rivals in business. For such injuries the damages in a suit at law could furnish no just compensation, and therefore chancery will interfere. *Webber* v. *Gage*, 39 N. H. 182, and *Watson* v. *Sunderland*, 5 Wallace, 74, are authorities in point. A system of jurisprudence would be radically defective that could not interpose to prevent wrongs of this character, incapable, from their nature, of being redressed by damages.

As to the right of the company to impose the extra charge of five dollars, on the ground that it is performing additional service, it need only be said that a railway company, although permitted to establish its rates of transportation, must do so without injurious discrimination as to individuals. It must deal fairly by the public, and this it would not be doing if allowed so to discriminate as to build up the business of one person to the injury of another in the same trade. It may fix its rate of charges for transporting a bushel of grain from any given station upon its line to Chicago, but, the grain being

taken there, it can not charge one rate for delivering it at the elevator of Munn & Scott, and another for delivering it at that of appellants. When it takes grain consigned to Chicago, its duty is to deliver it in Chicago, at any warehouse upon its line or side tracks to which it has been consigned. The object of the legislature, in passing the statute upon which we have commented, would be utterly defeated, if the companies were left at liberty to discriminate at their discretion in their charges for delivery at different warehouses. That is as much prohibited by the spirit of the law, as is the actual delivery to any other person than the consignee by its letter.

As to the general equity of the bill, it is hardly necessary to remark. It is to be hoped that when the answer comes in, and the evidence is heard, some explanation may be given by the defendant of its course. For the present, we must accept the bill as true. As the record now stands, the company seems to be using its vast powers, as a corporation, with a view to create a practical monopoly for a favored house, in dealing with all the grain that must necessarily come over its lines from the long tract of country that it traverses, thus ruining the business of the appellants, and inaugurating a policy which, if once established, would place the farmers of the State under grievous tribute; and all this in defiance of an act of the legislature so plain that he who runs may read. The act in question is an eminently wise and salutary law, and the courts should use all their legitimate powers to guard it against either open disobedience or covert evasion.

The decree of the superior court is reversed and the cause remanded. That court will award a temporary injunction, restraining the defendant from delivering to any other place or warehouse than that of complainants any grain consigned to their warehouse, or from imposing upon them an additional charge for such delivery, beyond what is imposed upon other warehousemen, taking from the complainants bond with approved security, conditioned in the usual manner, and if,

upon a final hearing, the case made by the bill is sustained, the court will make such injunction perpetual.

Decree reversed.

JOHN STILWELL *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. JUDGMENT FOR TAXES. The county court has jurisdiction to render judgment against delinquent lands, for taxes, at any regular term after April in each year, for the taxes of the preceding year, on legal and proper notice. The statute has not limited the rendition of judgment to the first Monday of May; nor does the statute, in terms, require that it shall be at that or any specified term.

2. SAME—*dismissed at one term no bar.* Where application was made for judgment against the delinquent list of lands, at the June term of the county court, and the court refused to enter judgment, because the list had not been filed five days, and a new application was made to the next August term: *Held*, that the refusal at the June term, not having been on the merits, formed no bar to rendering judgment on the second application.

APPEAL from the Circuit Court of Livingston county; the Hon. CHARLES H. WOOD, Judge, presiding.

The facts in this case are fully presented in the opinion.

Mr. S. D. FOSDICK and Mr. A. E. HARDING, for the appellants.

Messrs. PAYSON & FERRY, for the People.

Mr. JUSTICE WALKER delivered the opinion of the Court:

At the June term, 1867, of the county court of Livingston county, the treasurer made an application for judgment against the delinquent list of lands for taxes of the previous year. In this list were those of appellants, described in the bill of exceptions. They appeared and filed objections to the rendition of the judgment, first, because the application was made at the June term and not at the May term, and, secondly, because the list of lands was not filed five days before the commencement of the term. On the hearing, the court sustained the latter objection, and refused to order the sale of the lands.

The treasurer again applied for an order for the sale of the same lands at the next August term of the court, when appellants again appeared and resisted the application for a judgment, first, upon the ground that the court had no jurisdiction, and, secondly, because the court had refused to render judgment against these lands at the preceding June term. In support of the latter objection, they offered to read in evidence the record of the proceedings on the application at the June term, 1867, as a bar to the rendition of the judgment asked by the treasurer. The court overruled the objections, and rendered judgment for the sale of the lands embraced in the list. The case was thereupon removed to the circuit court by appeal, where, after a hearing, that tribunal affirmed the judgment of the county court, and the case is now brought to this court by appeal.

The question of jurisdiction involves the construction of portions of the revenue law and its several amendments. The 26th section of the act of 1853, Scates' Comp. 1073, provides that, if the taxes on lands shall be delinquent, it shall be the duty of the collector to make publication in a newspaper, in the manner and for the length of time specified, that he will apply "to the county court, at the ——— term thereof, for judgment against" the lands, for taxes, &c.; and also give notice that on the first Monday next succeeding the day fixed for the commencement of the county court, all lands against

which judgment shall be rendered will be exposed to sale for the taxes, &c. It will be observed that an unfilled blank is left for the term of the court, and that no term is fixed by this section. By the 30th section of the same act, ib. 1075, it is provided, that all suits for judgments against land for taxes on "delinquent lands and town lots, shall be made at regular terms of the county court, and sale shall be made at the time specified in the notice, whether the court remain in session or not."

The 8th section of the amendatory act of 1855, ib. 1108, declares, that the collector may advertise the list of delinquent lands, upon which taxes remain due and unpaid, on the second Monday in March, or at any time thereafter. The 10th section of the same act declares, all such lands "shall be sold on the second Monday of May next after they became delinquent, or as soon thereafter as practicable." The 11th section of the act of 1859, (Sess. Laws, p. 95), declares, that the terms of the county court, for the transaction of probate business, shall be held on the third Monday in each month. The act of 1849, p. 65, sec. 15, provides that the county judge, with two justices of the peace, designated, shall constitute a county court for the transaction of county business, and that the terms of their courts shall be held on the first Mondays of December, March, June and September in each year. The 5th section of the act of February 12th, 1849, Scates' Comp. 307, declares, that the county courts shall hold terms for the transaction of probate business on the first Monday of every month, except the months of December, March, June and September, and on the third Monday of these months. And the 15th section of the same act declares, that the county judge and the two justices of the peace which the law has designated, shall sit as a county court, for the transaction of county business, on the first Mondays of December, March, June and September, in every year. It is believed that these are the only enactments involved in the question presented by this record.

It will be observed, that the act of 1853, requiring the sale of delinquent lands, has omitted to fix any term, but, on the contrary, declares that applications for judgment for the sale of lands for taxes shall be made at regular terms of the county court. This would seem to leave the question, as to what term the collector would apply, to his discretion, to be controlled, of course, by circumstances. And such, we presume, was the design of the legislature. It is, however, insisted, that the act of 1855 has amended this provision and requires the sale to be made on the second Monday in May. But it will be observed that this is qualified with a further provision, "or so soon thereafter as practicable." This still leaves it uncertain at what term the application will be made and at what time the sale will occur, as that is to be governed by circumstances. And of the practicability of making the sale the collector must determine, and hence, the county court would have jurisdiction at any regular term at which he might apply. If, however, he delay and fail to collect the tax within the time limited by the law, it might raise a question as to his liability for a non-performance of his duty as collector.

In counties acting under township organization, there are no county courts for the transaction of county business, that duty having been imposed upon the board of supervisors. But the county court, held for the transaction of probate business, has been invested with jurisdiction, in those counties, to hear and determine the application for judgment on delinquent lands for taxes. If the judgment should be rendered at the April term, the sale could not be had on the second Monday in May and be on the first Monday succeeding the term at which the judgment was rendered. It then follows, that the application must be made at the May or some subsequent term of the court. From this it is seen, that the construction contended for by appellant is not practicable. We are, therefore, of the opinion that the county court may entertain jurisdiction at

any regular term after the April term, and properly render judgment against delinquent lands for taxes.

It appears from the record of the proceedings at the June term, that there was not a trial had on the merits, but judgment was refused because the list of lands was not filed five days before the term. This, at the most, only amounted to a dismissal of the proceeding, and no court has gone the length of holding that a dismissal of a suit may be pleaded in bar of a recovery on the same cause of action in a subsequent suit. In this case the principle differs nothing from any other dismissal, and this proceeding was not barred by the order rendered at the June term.

The judgment of the court below is, therefore, affirmed.

Judgment affirmed.

SIDNEY DUBOIS

v.

ANN ELLEN JACKSON.

1. MARRIED WOMEN—*rights of under the act of* 1861. Where parties residing in England were married there, and the wife, at the time of such marriage, was the owner of certain personal property, such marriage operated as an absolute gift of it to the husband, and the subsequent removal by the parties to this State, after the passage of the Act of 1861, worked no change in the title to such property, which by the marriage had vested in the husband.

2. The statute was never designed to take from the husband rights which had vested in him prior to its passage, or to take from him such as had been acquired in another State, subsequent to its passage.

APPEAL from the Circuit Court of Kankakee county; the Hon. CHARLES H. WOOD, Judge, presiding.

The opinion states the case.

Mr. WILLIAM PORTER, for the appellant.

Mr. MASON B. LOOMIS, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

This was an action of replevin, with a count in trover, brought to the Kankakee Circuit Court, by Ann Ellen Jackson against Sidney Dubois, for a piano, and a verdict and judgment for plaintiff, to reverse which, the defendant appealed to this court.

It appears, the piano in question was the property of the plaintiff at the time of her marriage with William Jackson, in England, in 1865, they both being then residents of that kingdom. On their immigration to this country, they brought the piano with them, and, as the facts tend strongly to show, it was sold by the husband to the defendant, and full payment therefor made by him, on delivery.

His wife brings this action, claiming the property as her own.

On the trial, the defendant asked the court to instruct the jury, if they believed from the evidence that the plaintiff was the wife of William Jackson, and that they formerly lived and resided in England, that previous to their marriage, and while they so resided in England, the plaintiff was the owner and possessed of the property in question, and that she was there married to William Jackson, then, and in that case, the title to the property in question was, by law, vested in her husband, and their subsequent removal to this State did not alter or change the title to the property, and the plaintiff cannot maintain this action.

This instruction the court refused to give, and an exception was taken. The case turns on this instruction, and we are at

a loss to perceive the grounds on which it was refused, unless they be found in the seventh instruction given for the plaintiff, to which exception was taken, which is as follows:

"The court instructs the jury, that under an act of the legislature of this State, passed in the year 1861, all the property, both real and personal, which any woman, married after the passage of that act, owns at the time of her marriage, by descent, devise or purchase, from any person other than her husband, together with all the rents, issues and profits thereof, does, notwithstanding her marriage, remain sole and separate property, under her sole control, to be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried, and is not subject to the disposal, control, or interference of her husband; and that under and by virtue of the provisions of said act, a married woman may bring a suit in her own name, without joining the name of her husband with her in such suit, for the recovery of her sole and separate property, and in this case, if you find, from the evidence, that the plaintiff was married to her present husband in the year 1865, and that she owned the piano in question at the time of said marriage, and if you further find, from the evidence, that she never in any way authorized her said husband to sell said piano, or ratified such sale, she has a right to recover in this action."

By the common law of England, where these parties were domiciled at the time of their marriage, the wife being then the owner of this property, the marriage was an absolute gift of it to the husband, and all the estate in it, of which the wife was actually and beneficially possessed at the time of the marriage, in her own right; and of such other goods and chattels as might come to her during the marriage. Coke on Litt. 305 *a*, 351 *b*.; 2 Bl. Com. 235.

And such was the law of this State prior to the Act of 1861. It cannot be conceived, that this act was designed to take from husbands rights which had vested in them prior to its passage, or to take from them such as had been acquired in another State, subsequent to its passage.

In 1865, in England, the right of the husband to this property was absolute, and he did not forfeit it, by his removal to this State. This is a proposition too plain for argument, being so fully supported by authority. Thus Story: a marriage contracted by citizens of Massachusetts, is a gift in law to the husband of all the personal, tangible property of the wife, and operates as a transfer of it to him, wherever it may be situate, at home or abroad; and the rights thus acquired by the law of the matrimonial domicil, will be held of perfect force and validity in every other country, notwithstanding the like rule would not arise in regard to domestic marriages by its own municipal code. Conflict of Laws, § 423. As Lord MEADOWBANK said, "The legal assignment of a marriage operates without regard to territory, all the world over. *Royal Bank of Scotland* v. *Cathbut*, 1 Rose's Cases in Bankruptcy, 481.

On the same principle is it, that a sale of chattels made in the country where the chattels are, and valid by its law, is valid everywhere. *Carneal* v. *Sewell*, 5 Hurlston & Norman 728; *Langworthy* v. *Little*, 12 Cush. 109.

The proposition contained in the plaintiff's seventh instruction, in view of the authorities, is so indefensible that time need not be expended in discussing it. It is idle to contend that a law passed by the legislature of this state could affect rights acquired in England. This court, in the case of *Farrell* v. *Patterson*, 43 Ill. 52, said, where a woman was married, and received large sums of money prior to the passage of the act of 1861, such moneys became the property of the husband, and any chattels purchased with them since the act of 1861, became his also. That the act was not designed to take

from the husband that which belonged to him in consequence of the marriage.

The court should have given defendant's tenth instruction, and refused plaintiff's seventh instruction, and all others of like character.

For the error noticed, the judgment is reversed and the cause remanded.

Judgment reversed.

Samuel McCarty *et al.*

v.

William H. Carter.

1. Infants—*contracts by—for improvement of their property—not binding.* Where work is done, or materials furnished, under a contract made with a minor, for the improvement of his property, such contract is not binding, and the contractor can claim no lien therefor against the property.

2. Same—*receipt of rents by—after majority—does not amount to a ratification of the contract.* And where improvements are made under such a contract, the receipt of rents, after he becomes of age, from the property so improved, does not amount to a ratification, so as to operate as a lien against his property.

3. Mechanic's lien—*mechanics and material men—must know with whom they are contracting.* A party performing work, or furnishing materials for the improvement of property, must ascertain whether the party with whom he is contracting is a minor or not, and if such contract is with one who has not attained his majority, it is not obligatory upon him, and the lien of the contractor fails.

4. Same—*persons having a less estate than the fee considered as owners to the extent of their interests.* Where a person holds a less estate than the fee, he is considered, under the statute, as the owner *only* to the extent of his interest or estate, and can not, by his contract, create a lien against the property to any greater extent than his right and interest therein.

5. Same—*estate acquired by marriage subject to the lien.* And the estate of a husband, acquired by marriage, may, by his contract, be subjected to the lien.

6. Same—*acts which will not amount to a ratification of a contract made by a person unauthorized to contract.* And where a contract is made by a person to erect a building upon premises which belong to another, and such contract is made without the knowledge or authority of the owner, the fact that such owner, after its completion, receives the rents and profits therefrom, does not amount to a ratification of such contract, so as to create a lien upon the premises.

Appeal from the Circuit Court of Cook county; the Hon. Erastus S. Williams, Judge, presiding.

The opinion states the case.

Messrs. Bonney & Griggs, and Mr. J. E. Fay, for the appellants.

Messrs. Thompson & Bishop, for the appellee.

Mr. Justice Lawrence delivered the opinion of the Court:

This was a petition to establish a mechanic's lien, brought by Carter, the appellee, against Samuel McCarty, Emily A. McCarty his wife, and Lucy J. Davis, a daughter by a former husband of said Emily A. McCarty. The lot upon which the building had been erected belonged to the daughter, subject to a right of dower in her mother. The appellee had made his contract in writing with Samuel McCarty. On the hearing, the court gave for the complainant the following instruction:

"If the jury shall believe, from the evidence, that the contract in question was made by McCarty on behalf of himself and Mrs. McCarty and Lucy J. Davis, and that he was authorized by them to make the same, (and that after the said Lucy J. became of age she received the rents and profits of the building erected under the contract, or any part thereof), then such contract is binding, although their names do not

appear in it, and it does not, on its face, purport to be their act."

The principle embodied in this instruction was repeated in several others, and we will first consider it in regard to the infant appellant. The lien in this class of cases arises from work done or materials furnished under an obligatory contract, and if the contract ceases to be binding the lien necessarily fails. An infant is not bound by his contract, except in certain cases, to which the erection of a building for rent does not belong. A conveyance or mortgage by him of his real estate would not be binding upon him, and the legislature certainly never intended to allow him to encumber his property, indirectly, by a contract for its improvement, when he can not do the same thing in a binding mode by an instrument executed expressly for the purpose. A minor who has nearly attained his majority may be as able, in fact, to protect his interests in a contract as a person who has passed that period. But the law must necessarily fix some precise age at which persons shall be held *sui juris*. It cannot measure the individual capacity in each case as it arises. It must hold the youth who has nearly reached his majority to be no more bound by his contract than a child of tender years, and neither in one case nor in the other can it permit a contractor to claim a lien against his property under the guise of a contract for improvement. This would expose minors to ruin at the hands of designing men. The mechanic who erects a building must take, like all other persons, the responsibility of ascertaining that he is contracting with a person who has reached the requisite age. We therefore hold it immaterial whether Lucy J. Davis, being then a minor, authorized McCarty to make this contract or not.

Neither do we consider her receipt of rents, after she became of age, such a ratification of the contract of McCarty, even though made, as the instruction says, in her behalf, as

would operate to create a lien against her. Ratification by an adult of a contract made by him when a minor is a question of intention. It can be inferred only from his free and voluntary acts or words. But it would be unreasonable to compel a minor to choose between the utter abandonment of his property and the creation of a lien upon it under a contract made during his minority, and to say, if he retains the property he ratifies the lien. If we were to hold that the mere receipt of rents amounted to a ratification, we should be taking from the minor the protection which the law designs to give him, for the builder might safely assume the minor would continue in the possession of his own property, and thus, by ratification, create a lien which the statute had not given when the contract was made. The builder might thus make what contract he could with the minor, under the assurance that, though the contract was not binding and the statute gave him no lien, one would nevertheless be worked out for him by a necessary ratification.

The court also, at the instance of the complainant, gave the following instruction:

"Any person is the owner of land, within the meaning of the statute relating to mechanic's liens, who has an interest for years in the property, by lease or otherwise, so as to entitle him to the rents and profits thereof."

It is insisted by appellee's counsel that this instruction is in accordance with the statute, which provides, "if the person who procures work to be done or materials furnished has an estate for life only, or any other estate less than a fee simple, in the land or lot on which the work is done or materials furnished, the person who procures the work or materials shall nevertheless be considered as the owner, within the meaning of this chapter."

The candor of counsel for appellee would have been less questionable if, in making this quotation from the statute, they had not stopped in the middle of the sentence. The provision of the statute is not that a person having a less estate than a fee simple shall be considered as the owner, but that he "shall be considered as the owner, within the meaning of this chapter, to the extent of his right and interest in the premises, and the lien herein provided for shall bind his whole estate therein in like manner as a mortgage would have done." As the legislature had, in the 1st section, given the lien, upon a contract with the *owner*, this provision was inserted in order to bring persons making contracts, and not technically the owners, within the operation of the statute to the extent of their interest or estate. The legislature was not guilty of the absurdity of undertaking to enact that a tenant for life or years could, by contract, create a lien upon the fee. This instructien should not have been given.

As to the appellant, Mrs. McCarty, it is impossible to determine, from this record, what her interest in this property is, as it does not appear whether her marriage with her present husband was contracted before or since the passage of the law of 1861 in regard to married women. We infer, however, that it was contracted before that date, and if her dower in this property was also assigned before the act was passed, it is clear the law could not divest her husband of the estate, during coverture, that he acquired by the marriage. *Rose* v. *Sanderson*, 38 Ill. 248. This estate in him would, of course, be subject to the lien. Whether the estate that would remain in the wife, should she survive him, would fall within the description of "sole and separate property," under the act of 1861, and whether a verbal contract made by her with a mechanic for its improvement would create a lien, are questions which counsel have not presented in their brief, and which we prefer not to decide without argument, upon a merely hypothetical state of facts. But, whatever may have

been the date of the marriage, the fourth instruction given for complainant was erroneous, both as to the wife and daughter. It was as follows:

"If the jury shall believe, from the evidence, that the contract in question was made by McCarty for himself, and also on behalf of his wife and daughter, and was ratified by both the wife and daughter by the receipt of the rents and profits of the building, or in any other way after said Lucy J. Davis became of age, and that any one of the said parties was the owner of the lot on which the building was placed, then such ownership of any of the three above named, is sufficient ownership to entitle the complainant to enforce a lien for any balance that may be due him under the contract, if there is, in fact, any balance due complainant under the same."

This instruction substantially tells the jury that the mere receipt of rents and profits from the building by Mrs. McCarty and Lucy J. Davis would have the effect of creating a lien, even though they had neither made the contract themselves nor authorized it to be made for them, and independent of all knowledge on their part as to the nature of the contract upon which the building was being erected. Even admitting them to have both been competent to contract, certainly the mere fact that McCarty made a contract for them, without their authority or knowledge, would neither bind them nor compel them to submit to a lien merely as a consequence of receiving rent. If they had been competent to contract, and knew that the building was being erected under a contract made in their behalf, by a person claiming authority to bind them, and had permitted the contractor to proceed under that belief, a very different question would be presented. We find no facts in this record from which it must be presumed, as a necessary inference, that McCarty would not have erected a building except upon a contract made in their name, and that they

must have known the contractor was acting under such a belief. Perhaps such an inference might be drawn by a jury, but there is nothing to justify the court so far to assume it as to instruct that the receipt of rents and profits would create a lien. If the husband had an estate during coverture, it is certainly not impossible that he would have made the contract in his own name and on his own credit.

For the errors indicated in the foregoing opinion the decree must be reversed.

As there is to be another hearing, it is unnecessary for us to discuss the question of damages.

Decree reversed.

ROBERT FOWLER

v.

WILLIAM L. PEARCE.

PRINCIPAL AND AGENT—*ratification.* Where a person in possession of the property of another, without the knowledge and consent of the owner, exchanges the same for other property and gives his individual note for the difference, and without disclosing the fact of ownership in another at the time of making the exchange, and afterward the owner receives the property so taken in exchange, thereby ratifying the act of such person as his agent; and the payee of the note, after learning the fact that such person acted as agent in the transaction, fails to notify the principal that he should look to him for the payment of the note, until after the principal has settled with the agent, and in such settlement had paid the agent the amount which he had given his individual obligation to pay; *Held*, that the principal was thereby discharged from any liability to the payee of the note.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

The opinion states the case.

Messrs. SPAFFORD & MCDAID, for the appellant.

Mr. GEORGE G. BELLOWS, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears, that some time in May, 1867, appellee exchanged a team of horses with Rufus W. May, for a horse which May had in his possession, and for the difference in the trade, May gave his individual note for two hundred dollars. It also appears that the horse May gave in exchange for the others, belonged to the appellant, but May does not seem to have disclosed that fact at the time the exchange was made. Appellant seems to have been absent in New York when the trade was made, but was informed of it by May, on his return, and that May had given his individual note for the difference, and May claimed an interest in the horses received in exchange, to the extent of the $200.

Appellant denies that May was his agent, or had any authority to act for him. Some time after the note became due, appellee called on appellant, and enquired for May, and appellant testifies that appellee stated he held a note against May, and wanted the money, but did not demand or ask pay from appellant. That sometime afterwards, in the month of September, after appellant had settled with May in relation to the horses, appellee demanded payment of the note from appellant. Appellee swears that he, at the first interview, told appellant he should look to him to pay the note; May swears that appellee called on him to pay the note. It appears, after the time when appellant testifies that he settled with May, appellee demanded payment of the note from appellant, and upon his refusal, brought this suit to recover that amount from appellant.

On the trial the court below gave this, among other instructions:

"3. If the jury believe, from the evidence, that the witness, May, by authority of defendant, made an exchange of horses with the plaintiff, for the defendant, and agreed to pay $200 as the difference of the exchange, and afterwards the defendant received the horses, with knowledge of the whole transaction, it was a ratification of the act of May, and the defendant would be liable to the plaintiff for the $200 so agreed to be given."

There was evidence tending to prove that appellant had settled with May before this suit was commenced, and he claims it was made without being notified that appellee looked to him for the payment of the $200. If this was true, and that was a question that should have been submitted to the jury, then appellant would not be liable for its payment. If they believed May had paid appellee the $200, and allowed him that amount in their settlement, without notice that appellee looked to him for its payment, there can be no reason for holding him liable to appellee. This instruction ignored this view of the case, and to that extent it was erroneous, and should not have been given without modification. On that question the evidence was conflicting, and the jury should have been left to settle it under proper instructions. This instruction may have mislead the jury in their finding, and for that reason the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

WINFIELD M. BULLOCK

v.

DENNIS NARROTT.

1. FRAUD—*how shown.* It is not the rule that fraud must be shown by affirmative testimony. Proof of such fact may be shown by circumstances, from the existence of which, the inference of fraud is natural and irresistible.

2. INSTRUCTIONS—*must be based upon the evidence.* It is error for the court to give an instruction which presumes the existence of a fact, that the evidence does not show to exist.

3. SAME—*which direct the jury to decide upon a question of law—erroneous.* The question, whether a mortgage had been properly executed and acknowledged, is one of law, to be passed upon by the court, and which it is error to leave to the decision of the jury.

4. FRAUD—*presumptive evidence of.* Where a party executed and delivered to another a chattel mortgage upon certain property, which was duly recorded, and shortly after died, and in an action of replevin for the mortgaged property, which had been taken upon execution, subsequently brought by the mortgagee, it was shown, that at the time of the mortgagor's death, he had in his possession the note for which the mortgage was given as security: *Held*, that this fact was a strong circumstance against the *bona fides* and honesty of the mortgage transaction, the presumption being, either that the note had never been delivered, or had been paid and taken up; and this, no matter how honest the transaction may have been.

APPEAL from the Circuit Court of Woodford County; the Hon. SAMUEL L. RICHMOND, Judge, presiding.

The facts in this case are fully stated in the opinion.

Messrs. INGERSOLL, MCCUNE & S. D. PUTERBAUGH, for the appellant.

Mr. JOHN CLARK, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

This was an action of replevin, in the Woodford Circuit Court, by Dennis Narrott against Winfield M. Bullock, the sheriff of that county, who had levied an execution upon the property in question, issued in favor of Backnell & McKinney, out of the clerk's office of the circuit court of Woodford, against Joseph Jacquin, bearing date September 30, 1867.

It appeared the property belonged to Jacquin, and was claimed by the plaintiff under a chattel mortgage executed to him by Jacquin, dated July 26, 1866, duly acknowledged and recorded, to secure the payment of a note of the same date, for $300. The property was levied on by the sheriff as the property of Jacquin, on the 17th day of December, 1867. The sheriff entered upon the property, took the keys and brought them away with him. The property was a warehouse, a corn-crib, a small frame building used as an office, and one Fairbanks scales, all on the right-of-way of the Toledo, Peoria & Warsaw Railroad, and so constructed as to be easily removed. The fee in the land was in the railroad company. Their value was about $8,000.

It was testified on the part of the defendant, by one Schneider, that on the 28th of October, 1867, the day of the death of Jacquin, his widow showed to him a note, payable to the same person and signed by the same person as the one offered in evidence by the plaintiff, saying, that she had found it among Jacquin's papers after his death; is satisfied the note in evidence is the same as the one showed him by the widow of Jacquin.

Mrs. Jacquin, the widow, testified, she could not read English; that after her husband's death she found some papers he had in his possession, and took them to Mr. Schneider, and afterwards gave the plaintiff, who is her brother-in-law, one of these papers.

It was proved by several witnesses, that in 1867, all the claim the plaintiff had against Jacquin was for some liabilities he was under as surety on a replevin bond to one Davidson,

which, if Davidson recovered, would amount to about $600, and for a debt he had paid one Cross, due by Jacquin, amounting to $144.

It was also proved by one O'Connell, when the mortgage was made, the property was worth about $6,920; that he had a conversation about this mortgage several times with plaintiff; first talked with him the winter after Jacquin's death, when he said, in one of the conversations, that he did not want to have any lawsuits, and wanted witness to write to Munn & Scott for him, and say that he would give them $700 or $800 for their claim against Jacquin and this property. Witness wrote the letter. Plaintiff then went on to say, that he wanted to get enough out of this property to pay Mrs. Cross, and to secure himself on the Davidson matter. He said if he could get enough out of it to pay Munn & Scott $700 or $800, and secure himself, he would be satisfied. He went on Davidson's replevin bond in April, 1867.

The jury, under instructions, found for the plaintiff, and after overruling a motion for a new trial, judgment was entered on the verdict.

To reverse that judgment, the record is brought here by appeal, and the errors assigned are, in giving improper instructions for the plaintiff, and overruling defendant's motion for a new trial.

It is clear, from the testimony, that the liability to Davidson did not exist when the mortgage was executed, and the only indebtedness by Jacquin to the plaintiff, was the comparatively small sum of $144 paid Cross.

The fact that the note was found in the possession of Jacquin at his death, is a strong circumstance, unexplained, to show, either it had never been delivered by Jacquin, or that it had been given up by the plaintiff. Most probably, the note was never delivered, and that the mortgage was executed to protect the property from creditors, and was not *bona fide.*

We think the evidence greatly preponderated in this direction, and established a fraudulent intent by both parties, and the jury should so have found, and probably would, had it not been for the instructions of the court.

Several of these instructions are quite objectionable. It is not true, as declared in the third and sixth instructions, that fraud must be shown by affirmative testimony, by which, we understand, positive and direct proof of the fact. It may be shown by circumstances, from the existence of which the inference of fraud is natural and irresistible.

The second instruction was wrong, as there was not a particle of evidence the mortgage was executed to secure future advances.

The third and tenth instructions required the jury to decide upon the proper execution and acknowledgment of the mortgage, and were improper. It was error so to instruct the jury. That was a question of law for the court, on its being offered in evidence.

The fourth, fifth, seventh and tenth instructions are not based upon the evidence, there being no proof the mortgage was made to secure either a debt then actually existing, or to secure future advances.

The ninth instruction is also objectionable, and well calculated to mislead the jury. The jury should have been told, it was a strong circumstance against the *bona fides* and honesty of the transaction, that the note was found in the possession of Jacquin at the time of his death. The presumption would be, either it was never delivered, or had been paid and taken up, and this, no matter how honest the transaction may have been.

We are not satisfied with the verdict and rulings of the court in this case, and are of opinion injustice has been done by them. There was no evidence, that at the time of the execution of the chattel mortgage, Jacquin owed appellee one dollar, and hence it was made to secure future indebtedness.

Jacquin was in debt, at this time, to Backnell & McKinney, on the note executed in 1859, on which the judgment in question was rendered, and it appears, from appellee's connection with O'Connell, that Munn & Scott had a claim against him for $700 or $800, which he wished to purchase. Taking, then, into consideration the fact that Jacquin owed appellee nothing when the mortgage and note were made; that the note was found in possession of Jacquin at his death; that Jacquin did owe Backnell & McKinney, and Munn & Scott, the conclusion is almost irresistible, that the mortgage was covinous, and designed to defraud, hinder and delay their creditors; that there was really no consideration for it, and ought not to be set up to defeat the claim of a *bona fide* judgment creditor.

The judgment must be reversed and the cause remanded.

Judgment reversed.

SARAH SEVIER

v.

SAMUEL L. MAGGUIRE *et ux.*

CHANCERY—*of proceedings to set aside a decree rendered by default for error apparent on its face.* S obtained a decree by default, subjecting certain lands, the title of which was in the wife of M, to the payment of a judgment in complainant's favor against M. The decree made no exemption of homestead rights, and also directed, in addition to the payment of S's judgment, the payment of a judgment against M in favor of E, who was not a party to the bill. Whereupon M and wife filed their bill to set aside the decree, for errors apparent on its face, and also to enjoin the sale of the land, on the ground that it was then, and at the time of the rendition of the decree, the homestead of M's wife. The court below rendered a decree wholly setting aside this former decree, for the reason of the error committed in providing for the payment of E's judgment: *Held*, that this was error; that the court should merely have modified the former

decree, by directing that that portion which related to E's judgment should be set aside, and directing, also, a sale of the land in payment of S's judgment, subject to the homestead right of M's wife, which right had been established by the proofs.

WRIT OF ERROR to the Circuit Court of Woodford county; the Hon. SAMUEL L. RICHMOND, Judge, presiding.

The opinion states the case.

Mr. JOHN CLARK, for the plaintiff in error.

Mr. A. E. STEVENSON, for the defendants in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

At the April term, 1865, of the circuit court of Woodford county, Sarah Sevier obtained a decree subjecting to the payment of a judgment in her favor, against Samuel L. Magguire, a tract of land, the title of which was in Harriet G. Magguire, the wife of said Samuel.

The bill in this case is filed by the said Samuel L. and Harriet G. Magguire to set aside the former decree, for errors apparent on its face, and also to enjoin the sale of the land, on the ground that it was, when said decree was rendered, and now is, the homestead of said Harriet and her children. The decree in the former case was rendered by default, and made no exemption of homestead rights. It also directed the land to be sold, not only for the payment of Sarah Sevier's judgment, but also in satisfaction of a judgment against Magguire and in favor of one Edgerly, who was not a party to the bill.

That, in this last respect, there was error on the face of that decree admits of no doubt. The court had no concern with the judgment in favor of Edgerly. He was not before the

court asking relief. For aught the court could know his judgment may have been paid, or he may not have desired its payment. As the decree was by default, probably the attention of the court was not called to this provision in it, and we are at a loss to conceive why counsel thought it a necessary or proper provision. It is said by counsel for plaintiff in error that this was the elder judgment, and therefore entitled to priority of payment. But it was not entitled to priority so far as regarded the fund to be raised by this proceeding, nor would it have been a lien on the land in the hands of a purchaser under the decree, the legal title never having been in the judgment debtor.

The decree in the present case wholly sets aside the former decree, giving as the reason therefor the error in regard to the Edgerly judgment. Instead of setting aside the former decree, the court should have merely modified it, by directing that so much of it as related to this judgment should be set aside, and should have directed a sale of the land in payment of the Magguire judgment, subject, however, to the homestead right of Mrs. Magguire. That matter not having been adjudicated in the former case, nor presented to the court either by the pleadings or proofs, it will be proper, in remodeling the decree, to direct the sale to be made subject to the homestead, the right to it having been clearly established by the proof.

The publication against Magguire was authorized by the statute, and as to him the court had jurisdiction.

Decree reversed.

WILLIAM P. MALBURN

v.

BALTHEZAR SCHREINER.

1. AGENCY—*evidence of.* Where a person in charge of a warehouse purchases grain, and ships it in the name of the owner of the warehouse, and he advances money to him on such shipments, and the purchaser ships none in his own name, it may be inferred that the person making the purchases is the agent of the person in whose name it is shipped, and the latter will be held liable to a person to pay for grain of whom a portion so shipped was purchased.

2. VERDICT—*evidence.* A verdict will not be set aside unless it is manifestly against the weight of evidence.

APPEAL from the Circuit Court of Stephenson county; the Hon. BENJAMIN R. SHELDON, Judge, presiding.

The opinion states the case.

Mr. F. C. INGALLS and Mr. H. C. HYDE, for the appellant.

Mr. J. A. CRAIN, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by appellee, in the Stephenson Circuit Court, against appellant. The declaration contained the common counts, and to it the plea of the general issue was filed. A trial was had before the court and a jury, resulting in a verdict in favor of plaintiff. A motion for a new trial was entered, which the court overruled and rendered judgment on the verdict, from which this appeal is prosecuted.

It appears, that appellee, in the autumn of 1864, delivered to Brewster a quantity of wheat and oats, which was placed

in his warehouse. Afterwards, the price was fixed upon the wheat, but that of the oats had been agreed upon before its delivery. Appellee received a portion of the price of the grain, but the balance remained unpaid; and claiming that Brewster purchased the grain as appellant's agent and for him, appellee brought this action to recover the price of the wheat remaining unpaid.

On the trial, appellee introduced evidence tending to prove that Brewster was appellant's agent in the purchase of grain. It clearly appears, that Brewster shipped grain from his warehouse in the name of appellant, and was in the habit of drawing money quite frequently from appellant. But there is no positive evidence that Brewster was acting as his agent in the purchase of grain, although the circumstances which were proved, would warrant the inference that he was. On the other side, the evidence tended to rebut the presumption, but it was not strong or conclusive. In a case of this character it is the province of the jury to weigh and fully consider all of the evidence, and give it such weight as they find it entitled to receive, and, having done so, their finding will not be disturbed unless it is manifestly against the evidence. We are unable to say that such is the case in this record. It is true, that it is not of that clear and satisfactory character which is desirable but not always attainable. There is evidence upon which to base the verdict, and it is not manifestly against the evidence.

It is insisted that, as the evidence shows that Brewster went to Lanark to do business on his own account, and it was transacted in his own name, it follows, that the jury should have inferred that he did not purchase the grain as agent of appellant. The evidence adduced by appellee does not tend to prove that Brewster was the general agent of appellant, and that all of his purchases were made for him, but it does tend strongly to prove that he did make some purchases for him. This is shown from his frequently getting money from appellant

and shipping grain in his name. And while the clerk of appellant states that appellant never advanced money to Brewster until after the shipment was made, still he does not say that appellant purchased the grain of Brewster, nor contradict the agency in its purchase. All that this witness testified to may be literally true, and still Brewster have purchased appellee's grain as the agent of appellant.

It appears that this grain was shipped at different times, after it was received, but it was not purchased or the price agreed upon until the fall following. It also appears that the shipments made by Brewster prior to June, 1865, were in the name of appellant. The station agent testified that he found, on the shipping books of the road, no shipment in his name between December and June. From this evidence it would seem that all of this grain, or nearly so, must have been shipped on account of appellant, and that Brewster must have acted as his agent. There is no evidence that appellant purchased the grain from Brewster, and we can only infer that he was acting as agent for appellant. The offer of appellee to sell the grain to Scott, in October of 1865, does not disprove the agency. He had stored his grain, and it had been shipped without his orders, and, we infer from the evidence, on account of appellant, and, so far as we can discover from the record, without his knowledge, and he may, and probably did, suppose that his grain was still in the warehouse. If it was shipped in the name of appellant, and he received the proceeds of its sale, he should not be permitted to escape paying for it simply because he fixed the price with the agent of appellant after he ceased to act for him. If it was stored with appellant's agent, and he shipped it for appellant, and the latter received the money, he clearly became liable to pay for it. And all the evidence considered, we are satisfied that it sustains the verdict, and there was no error in overruling the motion for a new trial.

The judgment of the court below is affirmed.

Judgment affirmed.

JOHN O'BRIEN

v.

HENRY PALMER.

1. VERDICT—*form of—generally in the control of the court.* In an action of assumpsit, for the purchase price of certain property, one point of controversy was, as made by the pleadings, whether the defendant was obliged to deliver up to plaintiff five certain notes executed by him to defendant, on a previous purchase of the same property from defendant, and the jury returned a verdict as follows: "We find the issues for the plaintiff, and assess his damages at $4,396. 65, and we find that the plaintiff is entitled to the possession of the five certain promissory notes in the proceedings mentioned, and produced upon the trial by the defendant:" *Held*, that it was not error for the court, of its own motion, to reject the latter portion of the verdict as surplusage, and render judgment simply for the money part.

2. NEW TRIAL—*verdict against the evidence.* This court has repeatedly said, that in cases where there is a contrariety of evidence, and the facts and circumstances, will, by a fair and reasonable intendment, warrant the inference of the jury, the court will, reluctantly, if ever, disturb the verdict, notwithstanding it may appear to be against the weight of the testimony.

3. But where the evidence is conflicting, this court will not disturb the verdict, even though it may be against the weight of evidence. It is the peculiar province of the jury to determine its preponderance.

4. EVIDENCE—*parol evidence admissible to explain the receipt of money.* Where in a bill of sale of certain property, the purchase price was stated to be $10,000, with the words, "Received payment in full:" *Held*, that parol evidence was admissible, to show that no money, in fact, was paid.

5. SAME—*cannot be admitted to vary the terms of the contract.* The principle is well settled, that parol evidence is admissible for the purpose of explaining a receipt for money, or to show that it was obtained by fraud or violence, but not to vary or explain the contract of the parties.

6. INSTRUCTIONS—*not germane to the issue—may be refused.* It is not error for the court to refuse an instruction which is not germane to the issue.

APPEAL from the Superior Court of Chicago.

The opinion states the case.

Messrs. SHOREY & HAYS, for the appellant.

Messrs. BURGESS, DRISCOLL & PFIRSHING, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit, brought to the Superior Court of the City of Chicago, by Henry Palmer, against John O'Brien, for the purchase price of certain property known as "Palmer's Great Western Circus," sold by plaintiff to the defendant.

The jury found for the plaintiff, and the court rendered judgment on the verdict, having overruled defendant's motion for a new trial.

To reverse this judgment, the defendant appeals to this court, assigning as error, among others, the refusal to give certain instructions asked for by the defendant, and in giving those asked for by the plaintiff, and in not setting aside the verdict as being against the weight of evidence, and because the verdict was not in proper form.

As to the last error assigned, it will be observed, one point of controversy between the parties was, as set out in defendant's second plea, whether defendant was obliged by the contract to deliver up to plaintiff five certain notes plaintiff had executed to the defendant, on a previous purchase by plaintiff from defendant, of the property in the circus, it appearing that plaintiff had originally bought the circus of defendant on a credit, evidenced by three notes, and had re-sold it to defendant.

The form of the verdict of the jury was,—

"We find the issues for the plaintiff, and assess his damages at $4,396.65; and we find that the plaintiff is entitled to the possession of the five certain promissory notes in the proceed-

ings mentioned and produced upon the trial by the defendant."

The judgment was entered simply for the money part of the verdict, the court, of its own motion, rejecting the last clause as surplusage, and in this there was no error to the prejudice of the defendant. Generally, the form of a verdict is in the control of the court. *Osgood* v. *McConnell*, 32 Ill. 75.

The judgment was rendered on the substantial part of the verdict, precisely as found by the jury.

On the point that the verdict should be set aside, as being against the weight of evidence, we have to say, and we have repeatedly said, where there is a contrariety of evidence, and circumstances will, by a fair and reasonable intendment, warrant the inference of the jury, the court will reluctantly, if ever, disturb their verdict, notwithstanding it may appear to be against the strength and weight of the testimony. *Lowry* v. *Orr*, 1 Gilm. 70; *Sullivan* v. *Dollins*, 13 Ill. 85; *Bloom* v. *Crane*, 24 ib. 48. And this court has also said, that a verdict will not be disturbed for any slight preponderance of evidence, but if there is a strong preponderance, it will be set aside, especially when apparent injustice has been done. *Chase* v. *Debolt*, 2 Gilm. 371; *Boyle* v. *Levings*, 24 Ill. 223; *Clement* v. *Bushway*, 25 ib. 200; *Bloomer* v. *Denman*, 12 ib. 240; *Goodell* v. *Woodruff*, 20 ib. 191.

And where the evidence is conflicting, this court has uniformly held, a verdict will not be set aside, even though it may be against the weight of evidence. *Morgan* v. *Ryerson*, 20 Ill. 343; *Martin* v. *Ehrenfels*, 24 ib. 189; *Pulliam* v. *Ogle* 27 ib. 189. In this case, the testimony was conflicting, and it was the peculiar province of the jury to determine its preponderance, an appellate court having no *data* by which to reconcile it, or means to weigh it.

The instructions asked by defendant and refused, were the seventh and twelfth. The seventh is as follows:

"The court further instructs the jury, that if they believe, from the evidence, that the plaintiff, Palmer, on or about the 8th day of October, 1866, executed and delivered to the defendant, O'Brien, a bill of sale of the property known as 'Palmer's Great Western Circus,' the facts stated in such bill of sale cannot be contradicted by parol testimony so far as it relates to the contract of sale between the parties."

In the bill of sale of the circus property, by appellee to appellant, the purchase price was stated to be $10,000, with the words, "Received payment in full."

It is well settled, that a receipt which on its face purports to be, and is, the contract of the parties, cannot be explained or varied by parol evidence, but such portion of it as merely goes to the receipt of the money, may be explained by showing no money was in fact paid.

The instruction, as worded, was calculated to mislead the jury, for while, on the one hand, the written contract could not be explained by parol, the receipt for the purchase price of the articles sold could be. It was, therefore, properly refused.

The twelfth instruction is as follows:

"If the jury believe, from the evidence, that on the 8th day of October, 1866, when the plaintiff sold the circus property in question in this suit to the defendant, O'Brien, the said defendant held five certain promissory notes against the plaintiff, which were then due and unpaid, and that said notes were to form a part of the consideration of said sale, then the plaintiff cannot recover in this suit any damages for the retention of said notes by the defendant, and the jury must find accordingly."

If this instruction was a proper one, the refusal to give it has not prejudiced the defendant, as the jury allowed no damages for the retention of these notes. The great point in controversy was, as to the money payment, the defendant testifying he paid it, the plaintiff swearing the contrary, and the jury, under the circumstances, chose to believe the plaintiff. The instruction was properly refused, as it was not germane to the issue. The plaintiff claimed no damages by reason of the retention of these notes.

We see no substantial objection to the sixth, seventh, tenth and sixteenth instructions given for the plaintiff. The sixth is but the repetition of a settled principle, that a receipt for money may be explained by parol, and it may be shown it was obtained by fraud or violence. This court has held, that the recital in a deed of the payment of the consideration money, may be contradicted by parol, but such evidence must not affect the legal import of the deed. *Kimball* v. *Walker et al.* 30 Ill. 482. So here, the parol proof was admissible, to show the money was not paid on the contract of sale, but not that a sale on terms different from the written contract was made.

The seventh instruction of the plaintiff had reference to the credibility of the defendant, based on statements made by him, supposed to be contradicted by other testimony in the cause, and of the same character is the tenth. They are as follows:

"7th. Should the jury believe, from the evidence on the part of the plaintiff, that the defendant, John O'Brien, at the time he received the bill of sale of the circus in question, at the Matteson House aforesaid, displayed a draft or check, and at the same time remarking, that he could not pay the plaintiff his $2,000 until he got the same cashed, and $500 more of some third party, or words to that effect, and the same is denied by John O'Brien in his deposition, which has been read to the jury, the jury are instructed that this is proper evidence for them to consider in determining whether such denial is

consistent with the statement made by the defendant, the said John O'Brien, that he had a short time previous, on the same morning, paid to the plaintiff the sum of $3,700.

"10th. If the jury are satisfied, by the evidence presented by the plaintiff, that the said defendant, John O'Brien, said to the plaintiff that the wagons and harness left at St. Joseph, Missouri, were not worth shipping, but that he should sell them at auction or otherwise for what he could get, such fact is proper for the jury to consider, whether the said defendant was ever led to believe, from the statements of the said plaintiff, that the said wagons and harness were worth the sum of $3,000, and whether the said defendant was holding the said five promissory notes of said plaintiff, as security for the delilivery thereof."

The sixteenth instruction went to the impeachment of one Campbell, a witness for defendant, and though not, perhaps, strictly accurate in its terms, it contains a correct legal principle. It is as follows:

"If the jury believe, from the testimony in the case, that in the fall of 1866, Oliver Campbell, while at Lincoln, State of Illinois, did state to one or more persons, that Henry Palmer, plaintiff in this case, had sold out his circus to John O'Brien, the defendant in this case, for what the plaintiff owed the said O'Brien, and $4,000 in cash besides, and O'Brien had not paid plaintiff said $4,000, and that the said Palmer was waiting in Chicago to get his money, or words to that effect, and that the statement of the said Campbell on the stand, in reference to the same subject matter, was willfully and corruptly false, then the jury are instructed that the testimony of the said Oliver Campbell is impeached, not only in the above particular referred to, but in all other statements made by the said Oliver Campbell, material to the issues and uncorroborated by other testimony unimpeached."

The controversy about the wagon left at St. Joseph, Missouri, is of no importance as weakening the plaintiff's claim to recover. By the contract, defendant was to receive the wagon at that place, and plaintiff sent it there, paid all the expenses of its keep, and directed it to be delivered to the defendant when he should demand it.

We have examined all the evidence in the case, which is quite voluminous, and it impresses us most forcibly with the justice of the plaintiff's claim, and that he ought to recover; and perceiving no error in the record, the judgment must be affirmed.

Judgment affirmed.

A. D. TITSWORTH *et al.*

v.

MARY F. STOUT.

1. TENANTS IN COMMON—*incumbrance removed from the common estate by one—other tenant must contribute to extent of his interest—of the lien for such contribution.* A and B were owners, as tenants in common, of a certain tract of land incumbered by a mortgage, which was foreclosed and the premises purchased by one C, who assigned the certificate to A. D, the mother of B, having a right of dower in an undivided half of the premises, and being also guardian of B, redeemed the same, by paying over to the master the full amount of the purchase, which sum was paid to A. In a suit for partition, by A against B and D: *Held*, that A must take her allotment, subject to D's lien for the payment of one-half of the redemption money.

2. That D, having redeemed the premises from the master's sale, had a valid claim against A to the extent of one-half of the redemption money paid by her, and which constituted an equitable lien on the land while in the hands of A, which a court of equity would enforce.

3. Where one tenant in common removes an incumbrance from the common estate, the other tenants must contribute to the extent of their respective

interests, and to secure such contribution, a court of equity will enforce upon such interests an equitable lien of the same character with that which has been removed by the redeeming tenant.

4. SAME—*of the purchase of an outstanding title by one tenant—rights of his co-tenant.* And where one tenant buys in an outstanding title, he can not set it up as against his co-tenant without giving him an opportunity to contribute and thereby participate in the benefit of such purchase.

5. SAME—*where affirmative relief is sought—a cross bill must be filed.* And in such case, inasmuch as the defendants B and D asked no affirmative relief by cross bill, a decree for the sale of the premises, in event of the non-payment of D's claim, could not be rendered.

6. SAME—*apportionment of incumbrances authorized by the partition act of 1861.* But, even without a cross bill, the decree, in such case, should, under the partition act of 1861, have provided, that A should take her allotment, subject to D's lien for the payment of one-half of the purchase money. This act expressly authorizes the apportionment of incumbrances.

APPEAL from the Court of Common Pleas of the City of Aurora; the Hon. RICHARD G. MONTONY, Judge, presiding.

This was a suit for partition, instituted by the appellee, Mary F. Stout, against the appellants, Janett Earl and Emily Parkhurst and others, in the circuit court for the county of Kendall, the petitioner alleging that she was the owner, and seized in fee simple, of an undivided one-half of certain lands in Kendall county, Illinois. A change of venue was taken to the Court of Common Pleas of the City of Aurora, where the cause was heard on petition, answer, replication and proofs, and a decree rendered, awarding partition as prayed. The further facts in the case are stated in the opinion.

Messrs. PARKS & ANNIS, for the appellants.

Messrs. WHEATON & MCDALE, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The appellee, Mary F. Stout, and an infant named Emily Parkhurst, one of the appellants, were the owners, as tenants in common, of a tract of land which was subject to a mortgage. This was foreclosed, and the premises were bought, at the master's sale, by one Phillips, who assigned the certificate of purchase to Mrs. Stout. The mother of Emily Parkhurst, having a right of dower in an undivided half of the premises, and being also guardian of Emily, redeemed the premises, within twelve months after the sale, by paying to the master the requisite amount under the statute. The master tendered the money to Phillips, who refused to receive it, saying the matter was out of his hands, and a few days afterwards Mrs. Stout demanded and received it, giving her receipt to the master. This took place in August, 1866, and the lien under the mortgage having been thus canceled, Mrs. Stout, in May, 1867, filed this bill for partition, making Emily Parkhurst and her mother parties. They answered, setting up the foregoing facts, which were also proved upon the hearing, but they filed no cross-bill. The court decreed a partition, setting off to Mrs. Stout, upon the report of the commissioners, one-half the premises, by metes and bounds, to hold in severalty. The defendants have prosecuted an appeal.

We have stated above all the facts that are really material, and from them it is plain that the mother of Emily Parkhurst, who redeemed from the master's sale, either in her own right, as dowress, or as guardian of Emily, has a valid claim against Mrs. Stout, which amounts to an equitable lien on the land while in her hands. This results from the familiar principle, that where one tenant in common has removed an incumbrance from the common estate, the other tenants must contribute to the extent of their respective interests, and, to secure such contribution, an equitable lien upon their interests, of the same character with that which has been removed, will be enforced by a court of chancery. The redeeming tenant in common, in order to secure contribution, is substituted to

the same lien which he has redeemed. On the other hand, where one tenant in common buys in an outstanding title, he can not set it up as against his co-tenant without giving him an opportunity to contribute, and thereby participate in the benefit of the purchase.

In the case at bar, Emily Parkhurst, or her guardian for her, had a right to redeem from the master's sale, and she could only redeem by paying the full amount of the purchase. It was not in her power to redeem her undivided half. If Phillips had retained the certificate of purchase, there would have been no question but that the redemption was equally for the benefit of the co-tenant, Mrs. Stout, and the latter would have been obliged to contribute. The fact that she had bought the certificate in no way affects this question. If she had canceled it, after buying it, she then would have had a claim against Emily Parkhurst's undivided half of the land for contribution. But instead of canceling it, she treated it as in force against her co-tenant, and, by virtue of its assignment to herself, demanded and received all the redemption money. She should only have received one-half, and should have directed the master to return the other half to her co-tenant. The equities of all parties would then have been adjusted, and this proceeding and the decree herein would have been proper.

If the defendants had filed a cross bill they would have been entitled to a decree enforcing their equitable lien against the complainant's estate in the premises, by directing its sale in case of non-payment. This they did not do, and as they asked no affirmative relief by cross bill the court committed no error in not decreeing a sale.

The court, however, did err in not providing, in its decree, that the complainant should take her allotment subject to the equitable lien of the guardian of Emily Parkhurst for the payment of one-half the redemption money. This would have been proper under the partition act of 1861, even

without a cross bill, as that act expressly authorizes the apportionment of incumbrances.

For this error the decree is reversed and the cause remanded.

Decree reversed.

JOSEPH JACQUIN

v.

CALVIN G. DAVIDSON.

1. VERDICT—*weight of evidence.* In a case where the evidence is conflicting, it is for the jury to determine its weight; and, when they have determined it, their verdict will not be disturbed unless it is manifestly against the evidence.

2. WITNESS—*competency of defendant.* Under the act of 1867, in reference to the competency of witnesses, where the agent of the purchaser who made the contract for the party, testifies in the case after the purchaser has died: *Held*, that the seller of the property is a competent witness in the case.

APPEAL from the Circuit Court of Woodford county; the Hon. S. L. RICHMOND, Judge, presiding.

The opinion states the case.

Mr. JOHN CLARK, for the appellant.

Mr. A. E. STEVENSON, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of replevin, brought by Joseph Jacquin, in his lifetime, to recover, from appellee, a crib of corn. Jacquin claimed to have purchased it from appellee for the

sum of five hundred dollars, to be paid before the corn was removed. Appellant claims that he paid fifteen dollars, through his agent, at the time the contract was made. It seems to be conceded that the corn was not to be removed until the money was paid, and it appears that it was tendered before the suit was brought. Appellee, however, claims that two hundred dollars of the price were to be paid by the middle of the week after the agreement was entered into by the parties. This, he insists, was the agreement, and constituted a part of the contract. On the part of appellant, it is claimed, that the agreement to pay the two hundred dollars depended upon whether appellee should want it, and that he did not demand the money. There is no evidence that it, or any part of it, was paid or tendered to appellee until the full amount was afterwards tendered before the suit was brought.

The right of recovery turned upon this question, and on that point the evidence was conflicting, and in the conflict of evidence it was for the jury to determine to which side they should, after weighing the testimony carefully, give credit. They have found that the payment of two hundred dollars at that time was a part of the contract, and we are not prepared to hold that their finding is not sustained by the evidence, as it is only where a verdict is manifestly against the evidence that we will disturb it. In this case there was evidence which is sufficient to support the verdict.

It is insisted that the court erred in permitting appellee to testify to the contract, the other party being dead. The 2d section of the act of February, 1867, relating to the competency of witnesses, prohibits one party from testifying, on his own motion, in the case, to facts occurring before the death of the opposite party, when he had died and his representative is prosecuting or defending the suit, except in a number of specified cases. The second exception declares, that if an agent of the deceased person shall testify in the case, then the opposite party may testify to any conversation or transaction

between such agent and the opposite party. In this case, the agent of Jacquin, who made the contract, was called, and testified as a witness on behalf of appellant. This, then, brought appellee within the terms of the statute, and authorized him to testify in the case.

The judgment of the circuit court is affirmed.

Judgment affirmed.

IMOZENS MOSER *et al.*

v.

DAVID KREIGH *et al.*

1. TRIAL—*of general and special objections—if removable must be specially stated.* This court has repeatedly said, that a general objection to an instrument of evidence, raises only the question of relevancy. If obnoxious to a special objection, that objection must be stated, in order that the party offering the proof, may, if in his power, have an opportunity to remove the objection. When the objection could not, from its nature, be removed by proof, such objection need not be specified, but is available on appeal or error.

2. CORPORATIONS—*when acts of an officer—presumed to have been done with authority.* Where an instrument undertaking for the delivery of personal property on the order of a corporation, was assigned by its president, the authority to make such transfer will be presumed, in the absence of proof to the contrary.

3. CHATTELS—*what amounts to a delivery of.* M & W gave to the Union National Bank a warehouse receipt, undertaking to deliver certain personal property on its order. This order the bank assigned to K & Co., to and for whom M, (one of the firm of M & W,) pointed out and separated from the common mass in the store, the articles covered by such receipt; and at the request of K & Co., who then and there took a list of the articles, M assented to take charge of them for K & Co. until called for by their order: *Held*, in an action of replevin by K & Co. against M & W, to recover the property, that the transaction must be regarded as an acknowledgment of ownership in K & Co., and as an actual delivery to them, entitling them to the possession.

4. ESTOPPEL. That M having turned out the property to K & Co., the firm of M & W cannot now claim that the articles so pointed out by M, and separated from the common stock, were not the same for which the receipt was given.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

The opinion fully states the case.

Mr. J. N. JEWETT, for the plaintiffs in error.

Mr. M. W. FULLER, for the defendants in error.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

This was an action of replevin in the Circuit Court of Cook county, brought by David Kreigh and Company, against Moser and Wild, for a quantity of soap, lard, oils and candles.

The pleas were *non cepit*, property in defendants, and property in one Thomas Miller. To each special plea, two replications were put in, one denying the property to be as alleged in the plea, and reaffirming the plaintiffs' right, and the other, that the plaintiffs were lawfully entitled to the possession of the property when the writ issued, and on these issues the parties went to trial before the judge, a jury having been waived, and the court found for the plaintiffs and assessed the damages at one cent, for which, with costs, judgment was rendered.

To reverse this judgment, the defendants bring the record here by writ of error, and make the point, first, that the receipt of defendants should not have been admitted in evidence.

The record shows no special ground of objection—it was a general one—and this court has held, that such an objection raises only the question of relevancy. If obnoxious to a special objection, that objection must be stated, in order, if in his

power, the party offering the instrument may have an opportunity to remove the objection. *Sargeant* v. *Kellogg*, 5 Gilm. 281. The objection made, going only to the relevancy, the paper was properly admitted, it bearing the signature of defendants, and its execution by them not denied. Proof of its execution was not demanded, nor was the absence of such proof a ground of objection, its execution not being in issue.

All the cases decided by this court on this point, are of two classes, the one where the objection, if removable, must be specially urged, and cannot be made in this court for the first time; the other, where the objection is intrinsic, and which could not, from its nature, be removed by proof. Such an objection need not be specified, but is available in this court on appeal or error. No objection was made of want of power in the president of the bank to assign the instrument; had it been made on the trial, it might have been removed by the production of the by-laws of the bank, conferring this power on its president.

The instrument in question is, substantially, an undertaking for the delivery of personal property on the order of the Union National Bank, and was payable to the order of the bank, and, in the absence of proof to the contrary, it must be presumed the president had authority to transfer it. *C., B. & Q. R. R. Co.* v. *Coleman et al.*, 18 Ill. 299; *Ryan* v. *Dunlap*, 17 ib. 40.

Of the same nature is the other objection, that the paper writing, being a mere incident of the debt, could only be conveyed along with the debt it was given to secure. This objection should have been made on the trial, as the plaintiffs might have shown they were the holders of the notes also, and thus removed this objection.

But, in the view we have taken of this case, we do not deem any of the objections of any importance, for it may be admitted, the assignment of the writing alone, gave plaintiffs no power to bring replevin for the goods.

The case rests on this ground: The defendants delivered the property to the plaintiffs. Moser pointed it out to Kreigh, thus separating it from the common stock, and, although such separation might not have been, technically, an estoppel, it completed whatever was before wanting, by defining what part of the stock was held under this writing, and was an appropriation of it for the purpose of answering the requirements of the writing. Moser, having turned out the property to Kreigh, it does not lay in the mouth of his firm now to say that it is not the same for which the writing was given. Suppose A owes B a sum of money, and B agrees to accept of A his horse in a stable with other horses, and A points out the horse to B, and tells him, there he is, and B assents, cannot B maintain replevin for the horse on the refusal of A to deliver him on demand? If not, why not? We see no difference in principle in the two cases.

The witness, Kreigh, states that after he had made a memorandum of the different articles, and their location in the store as pointed out by Moser, he notified Moser to hold the property subject to the order of Kreigh & Co., saying that they would send for it. He also said to Moser, that he regarded the property as the property of his firm, and desired Moser to hold it subject to their order, to which Moser assented.

It is true, a color somewhat different from this is sought to be given to the transaction by Moser, but we perceive nothing in the record or in the character of the acts done, to invalidate Kreigh's statement. The entire transaction, as between honest men, was quite natural. Had Moser then executed a new receipt, we cannot perceive it would have strengthened Kreigh's claim to the property; it would only havesimplified the proof. Suppose the president of the bank had gone with the note to the warehouse, and the same acts had been done with the property in his behalf, as were done with Kreigh, can it be doubted there would have been a complete transfer and delivery to the bank of the property in question? It is

no objection, the paper writing was not delivered up, for, on the refusal of Moser to execute a new receipt, it was necessary the original should be preserved, and, besides, Moser did not demand it should be given up to him.

We can regard the transaction in no other light than as an acknowledgment of ownership in Kreigh & Co. to the specified articles, and the separation of them from the common mass, in the mode indicated by the witness, as an actual delivery of the articles to them, entitling them to the immediate possession thereof.

The case of *Crane* v. *Pearson*, 49 Maine 97, we do not consider as analagous to this, as the horse was never delivered to Webber, symbolically or otherwise. Here was a delivery to Kreigh & Company.

Perceiving no error in the record, the judgment must be affirmed.

Judgment affirmed.

WALTER N. WOODRUFF *et al.*

v.

JOHN R. THORNE *et al.*

IMPLIED WARRANTY OF TITLE. Where the owner of a lumber yard adjacent to a railroad, in making sale of the lumber yard, professes to sell the superstructure of a side railway, laid upon the street, there is an implied warranty of title as to such side railway.

APPEAL from the Superior Court of Chicago.

This was an action in assumpsit, brought by the appellants, Walter N. Woodruff and Jackson E. Woodruff, against the appellees, John R. Thorne and Alexander L. Thorne.

The facts of this case are, that on the 11th day of September, 1867, the appellants bought from appellees their lumber yard and its appurtenances, situated on the south branch of the Chicago river; that among other things they purchased, was a side railroad track, extending along the east side of the yard, a distance of several hundred feet, together with the bumpers driven into the ground at the end of the track; that they paid to appellees for said track, the sum of $525, less 10 per cent., for which there is a written bill of sale duly receipted; that it subsequently appeared, that appellee did not own said track, but that it belonged to the Chicago & Alton Railroad Company; that appellants were obliged to deliver up said property to the company, whereby it was wholly lost to them. They now seek to recover said money back. . .

The only questions considered, are, did appellees sell this property to appellants, and if so, did they have title to the same?

Mr. G. A. FOLLANSBEE, for the appellants.

Messrs. MONROE & MCKINNON, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

It is clear from the evidence, that the appellees, in selling their lumber yard to the appellants, also professed to sell the superstructure of the railway, laid upon the street. Hence, there was an implied warranty of title, and if that has failed, the plaintiffs ought to recover. But the preponderance of the evidence seems to be, that the appellees did own the superstructure. True, the Assistant Superintendent of the Chicago & Alton road testifies, that he supposed that company owned

the switch, and had a right to place their cars there, when it was not used by the lumber yard; but he also says, he knows nothing of the arrangement under which the track was built. But John R. Thorne, one of the defendants, testifies that their firm not only did work on the switch, amounting to $318, but the rails were laid by the railway company, under an agreement that the appellees should pay therefor. A bill was presented by the company to the appellees, for the cost of laying the iron, against which they desired to set off a claim against the company, arising out of another transaction. The latter offered to balance the accounts, but the appellees claimed a balance to be their due over and above the cost of laying the switch. This matter is still unsettled. This testimony is corroborated by the road-master, who swears the appellees were to pay for laying the track, and he presented them a bill therefor, after it was laid.

From this testimony it would seem, the switch did belong to the appellees when they sold the yard, and though they may still owe the railway company a part of the cost of its construction, there has been no breach of the implied warranty of title.

Judgment affirmed.

The Western Union Telegraph Company

v.

The Pacific and Atlantic Telegraph Company.

1. Practice in the supreme court—*a writ of certiorari will not be allowed to bring up an original bill—not considered by the court below in its decree dismissing the cross bill.* Where the record shows, that the court below, in refusing an

injunction and dismissing a cross bill, acted *alone* upon such bill, without considering the original bill, in the proceedings thereunder, a writ of *certiorari* will not be allowed to bring up a copy of the original bill. In such case, it is not necessary that this court should inspect both the original and cross bills, in order to determine whether the court erred in its decree.

2. Errors—*confession of—by appellee.* And where, on an appeal to this court, from a decree denying an injunction and dismissing the cross bill of appellant, the appellant assigned as error—1st, That the court erred in denying the injunction, 2d, That the court erred in dismissing said cross bill; 3d, That the court erred in rendering a decree against the plaintiff, and 4th, That the court erred in not granting the relief prayed for by plaintiff; and the appellee afterwards confessed these errors, with the exception of the 4th: *Held*, that appellee thereby admitted, that the cross bill, on its face, presented a case, which, unanswered, in equity entitled appellant to an injunction.

3. Practice in chancery—*cross bills—upon filing of—to render final decree—without answer or default—error.* It is error for the court to render a final decree, upon the filing of a cross bill, granting the relief thereby sought, when no answer had been filed thereto by the defendants, nor any steps taken to place them in default.

4. Same—*rights of defendants in chancery—when final decree can be rendered.* A defendant, in chancery, has a reasonable time, within which to interpose his defense, by way of demurrer or answer, and, unless it is upon a bill *pro confesso*, or on a default to file an answer under the rules of practice, a final decree can not be rendered, except on a final hearing regularly had.

5. Jurisdiction—*of the courts of this State—co-extensive only with its limits.* The jurisdiction of our courts is only co-extensive with the limits of the State, and they can not send their process for service into other States and jurisdictions, for any purposes whatsoever.

Appeal from the Superior Court of Chicago.

The opinion states the case.

Mr. J. D. Caton and Messrs. Dent & Black, for the appellants.

Messrs. Tyler & Hibbard and Mr. Geo. C. Campbell, for the appellees.

Mr. Justice Walker delivered the opinion of the Court:

This was an appeal from the Superior Court of Chicago, from a decree refusing an injunction and dismissing appellants' cross bill and amended cross bill. On the meeting of this court appellants entered a motion for a temporary injunction, according to the prayer of the bill, to restrain appellees from attaching their telegraph wires on the poles upon which the wires of appellants were suspended, along the route of the Columbus, Chicago & Indiana Central Railway Company, extending from Chicago towards La Crosse, Indiana. The motion was allowed and the injunction granted, to continue in force until the further order of the court, or until this appeal should be decided.

Appellees entered a motion for the allowance of a writ of *certiorari* to bring up a copy of appellees' original bill, filed in the court below, and in which case this cross bill was filed. This motion was, however, denied, because it appears, from the record in this case, that the injunction was denied and the cross bill was dismissed upon that bill alone, without reference to the original bill, or proceedings thereunder, or any answer to the cross bill. Had the decree been otherwise, and it had appeared the application was heard upon it and the cross bill, then it would have been necessary to have before us the original bill of appellees, and have determined from it and the cross bill whether the court below had erred in dismissing the cross bill. But when we see that the superior court acted alone on the cross bill, and held that it, on its face, contained no equity, we can see that there was a final decree on the cross bill, and that it was not necessary to refer to the original bill, as it was not considered by the court on the hearing in the superior court. Hence, the motion for the writ of *certiorari* was refused.

On filing the record in this court, appellants assigned upon it these errors:

"1st. That said superior court erred in denying the injunction.

"2d. That said court erred in dismissing said cross bill and amended cross bill respectively.

"3d. That said court erred in rendering a decree against the plaintiff.

4th. That said court erred in not granting the relief prayed for by the plaintiff."

Afterwards, appellees confessed all but the last error. Having done so, they thereby confess that the bill, on its face, and, as it was framed, presented a case, which, unanswered, in equity entitled appellants to an injunction. This being so, it is unnecessary to discuss the questions presented by the errors which were confessed.

As to the fourth assignment of error, it is only necessary to say, that the case was not ripe for a hearing. It would have been error to have rendered a final decree granting the relief sought, on filing the amended cross bill, without answer or default. The practice in courts of chancery gives to defendants a reasonable time to interpose a defense, by way of demurrer and answer, and it would violate that rule of practice to grant the prayer of the bill merely upon its being filed, and upon a motion for a temporary injunction. In this case, the amended cross bill had just been filed, and appellees had not answered, nor had any steps been taken to place them in default. Unless it is on a bill *pro confesso*, on a default to file an answer, under the rules of practice a final decree can not be rendered except on a final hearing regularly had. This error is not well assigned.

After this case was submitted for decision, appellants entered a further motion to enlarge the injunction heretofore granted—to extend its operation so as to restrain appellees from attaching their wires to the poles upon which the wires of appellant are suspended in the State of Indiana. This motion must be

denied for the want of jurisdiction. The jurisdiction of our courts is only co-extensive with the limits of our State. They can not legally send their process into other States and jurisdictions for service. If the exercise of such a jurisdiction were attempted, and an injunction granted, and it should be disobeyed by persons in Indiana, this court would be powerless to enforce the injunction by attachment, and hence, the effort to exercise such a power would be readily defeated. But we are of the opinion that neither law nor comity between distinct State or national organizations, sanctions the authority of one such body to exercise jurisdiction over the citizens and their property, while both are beyond the jurisdiction of the tribunal in which the proceeding is pending. The courts of this State can not restrain citizens of another State, who are beyond the limits of this State, from performing acts in another State, or elsewhere outside of, and beyond the boundary lines of this State. Any other practice would necessarily lead to a conflict of jurisdiction.

But, for the errors confessed, the decree of the court below must be reversed and the cause remanded for further proceedings.

The injunction granted by this court will be continued until appellees shall file an answer to the cross bill and amended cross bill, when they will be at liberty to move to dissolve the injunction, precisely as if it had been granted by the superior court in the first instance. And if such a motion shall be entered, the court below will proceed according to the practice in such cases, and make such an order on the motion as the case may require.

Decree reversed.

Syllabus.

CHARLES A. RENO, Impleaded with PATRICK QUINN,

v.

ROBERT WILSON.

1. DAMAGES—*what will not be considered excessive.* In an action of trespass for false imprisonment and for assault and battery, the jury assessed the plaintiff's damages at $1,700, upon which judgment was rendered: *Held*, that such damages could not be considered excessive, the proof showing, that the defendant, influenced solely by a wilful and malicious nature, procured the arrest and prosecution of the plaintiff upon a charge of larceny, without the slightest grounds upon which to base a justification of, or even to instigate, his conduct.

2. SAME—*where a charge is made for probable cause.* But, where a person in good faith, and for probable cause, makes a criminal charge against another, the party so charged cannot, in the event of his discharge, recover heavy damages in an action for trespass against such person.

3. NEW TRIAL—*excessive damages.* And in such case, a new trial will not be awarded, on the ground alone, that the damages were excessive, even though this court would have been better satisfied with a verdict for a less amount, the jury having the right to give punitive or exemplary damages, and their verdict being warranted by the facts in the case.

4. INSTRUCTIONS. And in such case, it is not error for the court to refuse to instruct the jury to the effect, that if they believe that the defendant ordered the arrest of the plaintiff, and at the same time, stated the facts of the case to the officer making the arrest, the defendant is not liable for the arrest, if plaintiff was committing an act which made him liable to arrest, and they should find for the defendant. It was not for the jury to determine what acts made the plaintiff liable to an arrest, and there was no proof that plaintiff was doing an unlawful act.

5. Nor was it error for the court to refuse an instruction, which directed the jury, that unless the defendant *made the charge* against the plaintiff, he was not liable, when, under counts which charged an arrest and imprisonment, the plaintiff would have been entitled to recover, without reference as to who made the false charge.

APPEAL from the Superior Court of Chicago.

The facts appear in the opinion.

Mr. J. V. LEMOYNE, for the appellant.

Mr. GEORGE F. BAILEY, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

This was an action of trespass for false imprisonment, and for assault and battery, brought to the Superior Court of Chicago, by Robert Wilson, against Charles A. Reno and Patrick Quinn. Reno was alone served with process, and pleaded not guilty, and a special plea which should have been demurred out.

The jury found for the plaintiff, and assessed the damages at $1,700, for which the court rendered judgment, having denied a motion for a new trial.

To reverse this judgment, the defendant appeals to this court, and complains that the damages are excessive, and that the court refused to give the jury certain instructions for which he asked.

Had there been the least pretence for charging the plaintiff with larceny, had a single fact appeared, tending to substantiate such a charge, we would have no hesitation in holding the damages were so outrageously excessive as to demand the interference of this court. It must not be, that a person making, in good faith and for probable cause, such a charge, shall be mulcted in a civil action in heavy damages, in the event the party charged is discharged. Were it so, then good citizens would decline bringing a criminal charge, though the proof was strong, for fear of these consequences.

The proof greatly preponderates, that appellant charged appellee with larceny of a load of coal, and procured his arrest on that charge, and appeared as the prosecutor, for which there was not the slightest foundation. His conduct, from the

commencement to the termination of the prosecution, seems to have been prompted by no reverence for the law, by no desire to bring one of its violators to punishment, but to gratify bad passions, which, causelessly excited, appellant had not the firmness and discretion to restrain.

The arrest was attended with the most degrading and humiliating circumstances; he, a respectable young man, being confined all night with miserable creatures, offscourings of the slums and alleys of a large city, picked up by the policemen in their daily rounds—in a room crowded and filthy, with no bed but sawdust, and no food but scanty bread and cold water; taken thence to a police magistrate, through the public streets to a police office, exposed to the gaze of the populace, and to the jests and ribaldry of passers-by, who might think proper to indulge in them. And this, too, when there was no semblance of criminal conduct, and no act done which could be tortured into crime.

To say, under these circumstances, that $1,700 damages were so outrageously excessive as to require us to set aside the verdict, is what we cannot say, though we are free to say, we should have been better satisfied with a less verdict; but as the jury had the right to give exemplary or punitive damages, for which no very definite rule can be prescribed, the verdict must stand, unless the instructions were wrong.

Appellant claims that the large verdict was, in a great degree, owing to the refusal of the court to give the second and fourth instructions asked by him.

The court gave for him this instruction:

"If the jury believe, from the evidence, that the defendant merely stated facts to the policeman, without wishing an arrest to be made, he is not liable for the action of the policeman in making the arrest or for the imprisonment of the plaintiff, and the jury should find for the defendant."

He then asked this instruction:

"Even if the jury believe, from the evidence, that the defendant ordered the arrest, and at the time stated the facts to the policeman, he is not responsible for the arrest, if the plaintiff was committing an act which made him liable to arrest, and the jury should find for the defendant."

There are several serious objections to this instruction, one of which is, it was not for the jury to determine what acts made the party liable to an arrest, and the other is, there was no evidence the party arrested was doing any unlawful act."

The fourth instruction refused, was this:

"Unless the defendant made the charge of larceny against the plaintiff, he is, in no degree, responsible for any damage which the plaintiff sustained by reason of having been entered on the book at the police station, and if the damage was caused by this charge being made, the jury shall find for the defendant."

This instruction is somewhat obscure, but, as we understand it, it was calculated to mislead the jury. The action, in the first two counts, was for a malicious arrest and imprisonment, on a charge of larceny. The remaining counts did not allege he was arrested on that charge, so that the plaintiff would be entitled to recover, had he failed on the first two counts, on proving the other counts, substantially. It is difficult, if not impossible, to say what, in the estimation of the jury, caused the damage—the arrest and imprisonment, or the false charge. They are all calculated to damage a party, and damage is proved from the evidence. Now, it is clear, the defendant prompted this movement against the plaintiff—he was the prime actor in it, and whether he made a charge of larceny or

not, he would be responsible in damages for the unlawful arrest. Had the instruction been given as asked, it could not have aided the defendant, for it was impossible the jury should close their ears to evidence which went with powerful force to establish both charges against the defendant—both the arrest and the false charge of larceny. So much of this instruction as the defendant was entitled to, was given to him, in the instruction above noticed.

The other instructions relate to the giving punitive damages.

If there ever was a case demanding such damages, this is one, as there were not the slightest grounds on which to build a justification of defendant's conduct, or even to mitigate it.

The judgment must be affirmed.

Judgment affirmed.

HEZEKIAH M. WEAD *et al.*

v.

JOSHUA LARKIN *et al.*

MEASURE OF DAMAGES—*in action on covenant of warranty.* L, a grantee holding a covenant of warranty, was sued in ejectment by C, and a recovery had. C conveyed the premises to W, from whom L purchased: *Held*, in an action of covenant by L against his original grantors, that L, by the deed from W, obtained only the naked legal title, as the conveyance by C to W did not pass C's claim to *mesne profits;* and L, never having paid *mesne profits*, nor been damnified by the assertion of a claim to them, and C's right to recover them having been cut off by the statute, prior to the trial of L's suit, the defendants could only be charged with interest from the date of C's deed to W, the possession and profits having been enjoyed by L up to that time, under defendant's deed to him, and his purchase from W only covering the *mesne* profits back to the time when W's title accrued.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

This was an action of covenant, brought by the appellees, in the circuit court of Cook county, against the appellants, and was before this court at the April term, 1866, and is reported in the 41 Ill. 413, where will be found a full statement of the facts.

Messrs. HARDING & WEAD, *pro sese.*

Messrs. GOUDY & CHANDLER, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This case was before this court at the April term, 1866, and is reported in 41 Ill. 413, and the material questions presented by it were then decided. We there held the evidence showed an eviction under a paramount title for which these defendants must respond upon their covenants. It is not necessary to discuss again, in detail, the several points then and now presented. We find no error in this record except upon one question, and that relates to the date from which interest should be computed upon the purchase money as against the covenantors. We fully adhere to the general rule laid down in our former opinion upon that subject, but we were in error in supposing Larkin bought directly from the plaintiff in the ejectment.

Our attention is now, however, more particularly called to the conveyances from Cross to Williams, and from Williams to Larkin. The first bears date September 7, 1862, the second December 25, 1862, and the judgment in the ejectment was rendered January 13, 1862. If Larkin had bought directly from Cross, as was supposed in the former opinion, the presumption might well be indulged that the purchase was made

as a settlement of the entire litigation, including the claim of Cross to *mesne* profits, as it was made within less than a year from the date of the first judgment, and the Larkin heirs could have taken another trial. But Cross had conveyed to Williams, and this conveyance did not pass his claim to the *mesne* profits, which was a *chose in action*, and there is, therefore, no ground on which we can presume that the purchase by Larkin was anything more than a purchase of the naked legal title, without reference to *mesne* profits. Adams on Eject. 389; *Fenn* v. *Stille*, 1 Yates, 154. As, therefore, the Larkin heirs have never paid *mesne* profits, nor been damnified by the assertion of a claim to them, and as the right of Cross to claim them was cut off by the statute before this suit was tried, there is no basis for charging the appellants with interest except from the date of the deed from Cross to Williams, the possession and profits of the land having been enjoyed by the appellees until that time, under the deed of appellants, and their purchase from Williams only covering the *mesne profits* back to the time when his title accrued.

Decree reversed.

JOHN JOHNSTON

v.

LOUISA A. MAPLES *et al.*

1. EXECUTORS AND ADMINISTRATORS—*duties of—with respect to assets.* It is the duty of executors and administrators, enjoined by law, to reduce the assets of the estate to money, and report the same to the court, to be paid upon debts and distributed among the parties entitled to receive it.

2. SAME—*cannot loan the money of the estate without legal authority.* And if an executor loans the money of the estate, unless authorized or required so to

do, by the will, he does it in his own wrong, and it operates as a *devastavit*, and creditors, legatees or distributees, may sue and recover on his bond.

3. SAME—*a reasonable compensation will be allowed—for necessaries furnished minor heirs having no guardian.* And when an executor furnishes the necessary food and clothing for the support of minor heirs, having no guardian, he should be allowed to charge a reasonable compensation therefor.

4. EVIDENCE—*burden of proof—in suit on an executor's bond.* In a suit in chancery on an executor's bond, by the devisees, for an alleged misappropriation of the moneys belonging to the estate, where the defendant claims that such moneys were paid over by the exec tor to complainants, it is incumbent on him to satisfactorily establish such fact, the money having been in the hands of the executor, as proved by his report to the court.

5. PRACTICE IN THE SUPREME COURT—*when cross errors must be assigned.* Where an appellee, in a chancery suit brought to this court, desires to question the correctness of the decree rendered in the court below, he must assign cross errors, otherwise, this court will not examine the record, to ascertain whether errors have been committed which operate injuriously to him.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

The opinion states the case.

Mr. J. S. PAGE and Mr. WM. C. GOUDY, for the appellant.

Messrs. WAITE & CLARKE, and Mr. A. E. WOLCOTT, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a suit in equity, commenced by appellees, on the bond of James King, as executor of James D. Aymer, deceased, against appellant. The bill alleges that King, in his lifetime, committed waste, by appropriating assets and moneys of the estate to his own use, and afterwards died testate, leaving Mary King his executrix, who subsequently died intestate, and that Josephine Williams, since intermarried with E. L. Knott, was appointed administratrix of her estate.

It is alleged that Robinson, the co-security of appellant, had died, leaving J. N. Baker and M. D. Downs, his executors. The representatives of the securities of Mary King, are also made parties defendant. Appellees are the devisees of Aymer, being his widow and children.

It is claimed that appellant is liable for a balance due on a mortgage given by Weis, for the principal, $3,700, and three installments of interest of $370 each. Also, for a sum received of one Stewart, paid by him for a farm in McHenry county, and two payments made by Stewart, and a note given for the same property, of $188.40 each, and for a balance of $1,920. 57, shown to be in King's hands by his account current, filed in the probate court on the 30th September, 1852, and interest. On a hearing, the court below found that the executor had been guilty of waste and *devastavit*, to the amount of $1,500. 87, and decreed that appellant, as security on King's bond, was liable therefor, and that he pay to Louisa Maples $822. 65, and to each of the minor complainants $344.61, with interest from the date of the decree, and that he pay the same within 30 days.

The case is brought to this court by appeal, and a reversal is asked, because the court rendered the decree against appellant; and for dismissing the bill as to the other defendants, and not as to him.

On the other side, it is objected, that the amount is too small, as the court should have made no allowance for the board of infant complainants by King in his lifetime, and that the court should have allowed them one-half the amount reported to be in King's hands at the time of his last report to the probate court, with interest, making rests. That the executor was legally and properly chargeable with the money he reported to have received, over and above what he had paid, there would seem to be no question. He had no legal authority to loan the balance. His duty was to reduce the assets to money and report it to the probate court, to be paid upon debts proved and

allowed against the estate, or if not required for that purpose, then to be distributed to the legatees, under the order of the court, and according to the terms of the will. If he loans the money of the estate, unless authorized or required by the will, he does it in his own wrong, and it operates as a *devastavit*, and creditors, legatees and distributees may sue and recover on his bond. The law requires him to reduce the assets to money, pay the debts and discharge the legacies, or distribute the fund among those entitled to receive it.

But in this case, we find no evidence that the money which was thus loaned, ever came to the hands of the legatees, or that they derived any benefit from the balance the executor reported he had received, over and above the debts and payments made to one of the legatees. And while he was clearly chargeable with the $1,920.57, he should be allowed all reasonable and fair allowances for moneys necessarily expended in the support of the children. They seem to have had no guardian, and it was imperatively necessary that they should be supported. Clothing and food were indispensable, and while the law guards, with jealous care, the money and property of minors, it will not prohibit the furnishing of food and clothing which is indispensable, until an order of court can be obtained. Where there is no guardian, to prevent persons from furnishing such necessaries, and to charge a reasonable compensation in such cases, would be cruel to the helpless minor, who is incapable of earning a livelihood, or to provide for the imperative demands of nature. Such a rule would, although abundantly able, send minors to the poor house, or put them upon the charity of the world, in many cases.

An infant may make a binding contract for necessary food, clothing, medical aid and education, and if unable, from tender age, to procure them, others may furnish them and charge a reasonable price therefor.

The court below did right in allowing for the board of the two minors. And on the question of what it was reasonably

worth, the evidence was not harmonious. It varied largely, and the court adopted a medium price, and we are not prepared to say it was wrong. As to whether King had paid Mrs. Maples in full, the evidence was conflicting, and by no means satisfactory. The court below, we think, was warranted, however, in the conclusion, that he had not paid her in full. The money being in his hands, as proved by his report, it was for appellant to show, satisfactorily, that it was paid to her, and this, we think, he failed to do. We do not see that the court below rejected any item claimed as a payment to Mrs. Maples, by King, that should have been allowed. And so far as the statement of that part of the account is concerned, we perceive no error.

As cross errors were not assigned, the other questions discussed by counsel do not arise in the case. If appellees were not satisfied with the decree, and were of the opinion that they were entitled to a larger amount, they should have brought the record to this court on error or appeal, or when it was brought here by the other party, should have assigned cross errors, if they desired to question the correctness of the decree. They have done neither, and we cannot look into the record to see whether there are errors which operate injuriously to appellees. They having assigned no cross errors, are not in a position to question the correctness of the decree, and perceiving no error committed against appellants, the decree of the court below must be affirmed.

Decree affirmed.

THE AURORA FIRE INSURANCE COMPANY

v.

JAMES W. EDDY.

1. INSURANCE—*of the policy—rule of construction.* The rules by which a policy of insurance is to be construed, and the principles by which it is to be governed, do not differ from other mercantile contracts.

2. SAME—*conditions and provisions in policy—construed strictly against insurers.* But conditions and provisions in a policy of insurance are to be construed strictly against the underwriters.

3. SAME—*construction of a particular clause in a policy.* Where a policy of insurance contained the following clause: "It is expressly agreed that the assured is to keep eight buckets filled with water, on the first floor where the machinery is run, and four in the basement by the reservoir, ready for use at all times in case of fire": *Held*, that this could not be considered either as a condition or proviso in the policy, but was an express agreement on the part of the assured, and which must be construed like other agreements.

4. The rule for the construction of such an agreement is, that while the assured will not be held to a literal compliance with the warranty, as for instance, in keeping the buckets filled with water during the winter season, when no fires were allowed in the building, which might be impossible, and could not have been contemplated by the parties, yet it is, under such agreement, incumbent on the assured to keep the required number of buckets in good and serviceable condition, at the places designated, ready for instant use. A failure to do which, should a fire occur, would prevent a recovery upon the policy.

APPEAL from the Circuit Court of De Kalb county; the Hon. THEODORE D. MURPHY, Judge, presiding.

The opinion states the case.

Mr. S. W. BROWN, for the appellants

Mr. CHARLES WHEATON, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit, on a policy of insurance of four thousand dollars on a three story flax factory, brought by James W. Eddy, against the Aurora Fire Insurance Company, and which resulted in a verdict and judgment for the plaintiff for three thousand five hundred dollars.

To reverse this judgment the defendants have appealed to this court, and several points are made, but one of which we deem important to notice.

The policy contains this clause:

"It is expressly agreed, that the assured is to keep eight buckets filled with water on the first floor where the machinery is run, and four in the basement by the reservoir, ready for use at all times in case of fire; also, that smoking shall be strictly prohibited in or about the building."

The application for insurance contained a like agreement.

There was proof that some buckets were in the building, and that sometimes all of them would be above, and sometimes all below.

The court, on behalf of the plaintiff, instructed the jury, that insurance policies were to be liberally construed in favor of the assured, and strictly construed against the underwriters, and that a substantial compliance with the stipulations of the policy was all that was required on the part of the assured, and if the jury believe, from the evidence, that the plaintiff substantially complied with the stipulation concerning keeping the buckets of water in the building insured, contained in the policy in this case, then that was all that was required of the assured under the stipulation, and on that point the law was with the plaintiff.

This instruction, and one refused for defendants on the same subject, is the part of the case we have considered.

As to the first branch of plaintiff's instruction, we have always understood that the rules by which a policy of

insurance is to be construed, and the principles by which it is to be governed, do not differ from other mercantile contracts, but conditions and provisions in such policies are to be construed strictly against the underwriters, for the reason that they tend to narrow the range and limit the force of the principal obligation; but this was not a condition or proviso in the policy, but an express agreement of the assured, to be construed by the same rules by which other agreements are construed. But, if the underwriters have left their design or object doubtful by the use of obscure language, the construction ought to be, and will be, most unfavorable to them, but nothing of that kind is apparent here. It was an express agreement of the nature of a promissory warranty that the assured would have the number of buckets specified always filled with water and disposed upon the floors as therein stated.

Appellee has referred to some cases in which a stipulation in a policy that a watchman was kept on the premises does not require that a watchman be kept there constantly, but only at such times as men of ordinary care and skill in like business keep a watchman on their premises. *Houghton* v. *Manuf. Ins. Co.*, 8 Metcalf, 122, and *Crooker* v. *People's Mutual Ins. Co.*, 8 Cush. 69. These cases go to the extent claimed. Those cases and *Hovey* v. *Amer. Mutual Ins. Co.*, 2 Duer, 554, proceed upon the ground that the spirit of the warranty was that there should be a competent night watch kept on the insured premises, and one who might be confided in for the faithful performance of such duty.

Other respectable courts have not gone quite to the extent of those cases on this point. In the case of *Glendale Woolen Co.* v. *The Protection Ins. Co.*, 21 Conn. 19, it was held, where one condition of the policy was there should be a watchman nights, that was a warranty by the assured, that they would keep a watchman in the mill through the hours of every night in the week, and the watchman having been absent on Sunday morning early, when the fire occurred, there could be no

recovery on the policy. The court said, where there is no imperfection or ambiguity in the language of a contract, it will be considered as expressing the entire and exact meaning of the parties, and no evidence of extrinsic matters or usages will be received to vary the terms expressed. The case of *Sheldon & Co.* v. *The Hartford Fire Ins. Co.*, 22 ib. 235, is to the same effect.

In the review of the cases on this subject which time has enabled us to make, we have thought there was a just mean between the extremes of the different cases examined, which, when found, would establish a satisfactory rule.

Whilst this is an express agreement of these parties, and giving force and effect to the well recognized rules for construing agreements, in which the intention of the parties is an important element, we think the court, in construing it, by the fourth instruction complained of, misled the jury.

It could not have been in the reasonable contemplation of either of these parties, that in a cold mill, where fires were not allowed in the winter season, buckets of water should be on hand at all times, for this might have been an impossibility; nor could it have been understood that the buckets should be covered up and hid from ready access by piles of flax, or stowed in an out-of-the-way place.

We think, therefore, that the jury should have been told, that, whilst from freezing, or other unavoidable causes, a literal compliance with the warranty might have been impossible, and could not have been in the contemplation of the parties, still it was incumbent on the assured to show that the required number of buckets, in good and serviceable condition, was at the places designated in the agreement ready for instant use. What was a substantial compliance was a mixed question. By the instruction we think the court should have given, as above, the attention of the jury would be fixed upon certain facts necessary to be proved, which, when proved, would hold the underwriters and show a compliance with the agreement in its

spirit and intent. As given, the instruction must have misled the jury,—it gave them too wide a discretion,—and was erroneous, and this error must reverse the judgment. *Taylor* v. *Beck*, 13 Ill. 386. These remarks render any notice of the defendants' instructions on the same subject, unnecessary at this time.

The judgment is reversed and the cause remanded.

Judgment reversed.

HANNAH A. McMURPHY

v.

S. S. BOYLES and W. F. COOLBAUGH, Executors, &c.

1. WILLS—*extent of widow's claim to the personalty of her husband who dies testate—leaving no lineal descendants—and she renounces the will.* A husband died testate, leaving a widow, but no children or lineal descendants, and provided, in his will, that the income of one-half of his personal estate should be paid to his widow during her life, and at her death should be distributed among his collateral kindred, and bequeathed the other half to various persons. The widow renounced the will, and set up claim to the entire personal estate: *Held*, that in such case, the widow was only entitled to one-third of the personal property remaining, after the payment of debts, in addition to the award of specific property.

2. SAME—*renunciation of—does not render the testator's property intestate.* By the widow's renunciation of the will, the property of her husband is not thereby converted into an intestate estate. The will remains, notwithstanding she declines its provisions in her favor; and in such case, the 46th section of the statute of wills, which applies only to intestate estates, has no application.

3. STATUTES—*construction of sec.* 10 *of the dower act.* The phrase, "her share in the personal estate of her husband," which occurs in the 10th section of the dower act, must be understood as intending to give to the widow, in such case, only such share of the personal estate as shall be equal to one-third part.

APPEAL from the County Court of Cook county; the Hon. J. B. BRADWELL, Judge, presiding.

The facts in this case are sufficiently stated in the opinion.

Messrs. BRACKETT & WAITE, for the appellant.

Mr. M. W. FULLER, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

Hiram C. McMurphy died, testate, on the 13th of October, 1867, leaving a widow, but no children or descendants of children. He left a considerable personal estate, and provided in his will that the income of one-half of it should be paid to his wife during her life, and, at her death, this half should be distributed among his collateral kindred. The other half he bequeathed to various persons. His wife duly renounced the will, and claims the entire personal estate. The probate court decided she was only entitled to one-third, and from that judgment the widow appealed. The question presented by this record is, what is the extent of the widow's claim to the personalty of her husband, where he dies testate, leaving no children or lineal descendants, and she renounces the will? This case has not been expressly provided for in our statutes, and has not yet been settled in this court by construction.

The claim set up by the widow in this case is certainly startling. It is, that a married man, having a wife, but no lineal descendants, has no right of testamentary disposition in regard to his personal property, in which species of property the great bulk of a large estate is often invested. He may have an abundant fortune and indigent parents, brothers or sisters, for whom he desires to provide, and yet, under the view of our statutes urged by counsel for appellant, all bequests for their benefit can be appropriated by the widow

at her discretion. While a father may be permitted wholly to disinherit his own offspring, he can not, on this theory of our law, be permitted to bequeath even a fraction of his personalty to any person but his wife, if he dies without lineal descendants, and his widow chooses to defeat his wishes. While the wife has the uncontrolled power of testamentary disposition as to her entire separate estate, the husband, leaving a widow, but no lineal descendants, has practically none as to his personal property. This theory would go even further, for it would require us to hold that, while a husband dying without children or their descendants, could dispose by will of none of his personal property, and only one-half of his realty, except with the consent of his wife, one dying with children could dispose of two-thirds of the personalty and all the realty, without reference to the wishes of either widow or children, except so far as relates to the widow's award of specific property, and her right of dower. A construction leading to such results should not be adopted unless it appears to have been the plain intent of the legislature.

The 10th section of the dower act, Scates' Statutes, p. 152, provides as follows:

"Every devise of land, or any estate therein, by will, shall bar her dower in lands, or her share in personal estate, unless otherwise expressed in the will; but she may elect whether she will take such devise or bequest, or whether she will renounce the benefit of such devise or bequest, and take her dower in the lands, *and her share in the personal estate of her husband.*"

The case arises under this law, and the question is, what did the legislature mean by "her share in the personal estate of her husband?"

Cross-errors are assigned by consent, and it is insisted by counsel for appellees that the "share" referred to consists

merely of the widow's award of specific property, and of her distributive share of any personal estate which has not been bequeathed, or the bequest of which has become void. This position is untenable. Nothing can be plainer than that this section was designed to give the widow some share in the personal estate which she could obtain only by renouncing the will. Yet, by the express provisions of the statute, the widow is entitled to her award of specific property independently of any renunciation of the will, and so this court held in *Deltzer* v. *Scheuster*, 37 Ill. 301. So, also, in regard to personal property not bequeathed. The 42d section of the statute of wills provides, that all such property "shall be distributed in the same manner as the estate of an intestate." The widow would, therefore, be entitled to her share of such unbequeathed property, whether she renounced the will or not. Neither of these theories solves the difficulty.

On the other hand, it is urged by counsel for appellant, as already stated, that the widow, having renounced the will, is entitled to the same share of the personal estate that she would have received had there been no will, which, in this case, as there were no children, or descendants of children, would be the whole. This theory proceeds upon the assumption that, by the widow's renunciation of the will, the testator had become intestate, which is simply a contradiction in terms. The will remains, notwithstanding she has chosen to decline its provisions in her favor, and by no act of her's can it be annihilated, and the estate of her husband be converted into an intestate estate. Yet the 46th section of the statute of wills, under which this claim to all the personal property is made, applies only to intestate estates. This case, then, is not within its category.

In fact, so far as express legislative enactment is concerned, this is a *casus omissus*, and yet we do not think it difficult to determine what was the legislative intent. From the time of the ordinance of 1787 to the year 1845, a widow was entitled

to one-third of the personal property, absolutely, after the payment of debts, even though the husband left children surviving. This, having been always the law of this territory and state, was universally known to our people, and the share of the widow was popularly designated as "the widow's third." The statute of wills of 1829 was in force at the time the revised code of 1845 was adopted, and the 40th section of that statute provided for renunciation by the widow of her husband's will, and that, upon such renunciation, she should be entitled, besides dower in the realty, to one-third of the personal property after the payment of debts. In the revision of 1845 this provision was transferred from the statute of wills to that of dower, and the 39th and 40th sections of that statute became, in substance, the 10th and 11th sections of our present statute of dower, but the draughtsman, instead of defining, as in the old law, the precise quantity of the widow's interest, merely provided that she should have "her share" in the personal estate. What was her share? What must we suppose the legislature intended by a phrase which they did not define, but which, from the first settlement of the country up to that date, had always represented a well known fraction? Did they intend to place the entire personal property of the husband dying without lineal descendants beyond his testamentary control, or only to secure to his widow an absolute right to the same one-third part which she had always enjoyed?

But the revision of 1845, though upon an excellent plan, was somewhat hastily executed, and some omissions occurred. Thus, at the very time when, upon the theory of appellant's counsel, the legislature was clothing the wife with power to take the entire personal estate of her husband in opposition to the provisions of his will, if he died without issue, they were depriving her of all interest in said estate, except the award of specific property, in case he died intestate and left lineal descendants. But this omission was corrected in 1847, when

her paramount right to a third part, after payment of debts, even as against his children, was restored. It thus appears, that from the first law upon this subject in 1787 to the present time, with the exception of this two years' omission, which we must regard as accidental, the wife has been entitled to a share of the personal estate, even as against the children, equal to one-third part. The law of 1829, providing for renunciation, gave her the same share as against her husband's will, and the law of 1845, which continued in force her right to renounce and to take her share without defining it, we must understand as intending to give her this same interest of one-third. This construction violates no other provision of the statute, is reasonable in itself, and in harmony with the entire spirit of our legislation on this subject from the origin of our territorial government. It gives the wife the same rights as against the children of her husband dying intestate, and as against the beneficiaries in his will if he dies testate, and it leaves him a right of testamentary disposition as to two-thirds of his personal property,—a right which he certainly ought to possess, and of which we can not believe the legislature ever intended to deprive him. The right of testamentary disposition of personal property is expressly given, by the 1st section of the statute of wills, to all males above the age of twenty-one, whether married or unmarried, yet this statute would be, to a considerable extent, annulled by the construction which appellant's counsel would give to the section of the dower act under consideration. This construction we can not adopt.

One branch of this subject was before us in the case of *Lessley* v. *Lessley*, 44 Ill. 527. Our attention in that case was chiefly directed to the consideration of the extent of the widow's interest in the real estate. The decree of the circuit court had given her one-half of the real estate in fee, dower in the other half, and all the personal property, after payment of debts, and the decree was reversed as to both realty and personalty, without, however, deciding

the precise extent of the widow's interest in the latter, the argument having been directed to the questions arising in regard to the realty. We have now considered the subject with much deliberation, and our conclusion is, that, in a case like the present, the widow is entitled to one-third, and only one-third, of the personal property remaining after payment of debts, in addition to the award of specific property.

The judgment of the county court is affirmed.

Judgment affirmed.

THOMAS W. BAXTER

v.

FREDERICK J. HUTCHINGS *et al.*

1. MECHANIC'S LIEN—*petition—contract.* Where a petition for a mechanic's lien alleges that the son of a widow, who was the owner of a mill, contracted for machinery to place therein as well for himself as for the mother, with her knowledge and consent and as her agent: *Held*, that it was sufficient on demurrer. But, to succeed, it must be proved that the son had authority from the mother to make the contract; that his mere possession of the mill as agent or otherwise is not evidence of authority to bind any interest, other than his own.

2. CONTRACT—*its performance.* Under the law of 1845, it was necessary to perform the contract for the delivery of materials within the specified time, to preserve the lien, but under the act of 1861 it is otherwise. Under the latter act the lien will continue if the materials are furnished after the stipulated time, provided the delivery is completed within one year from the time of commencing their delivery.

WRIT OF ERROR to the Superior Court of Chicago; the Hon. JOHN A. JAMESON, Judge, presiding.

The facts in this case are fully presented in the opinion.

Mr. LEWIS UMLAUF, for the plaintiff in error.

Messrs. WOODBRIDGE & GRANT, for the defendants in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

Plaintiff in error filed his petition in the court below, alleging that he is entitled to enforce a lien against the premises described, for the price of materials furnished by him, to be placed in the mill of Sarah Hutchings. The petition sets out a letter of plaintiff in error, written to Frederick J. Hutchings, son of defendant in error, in which he makes propositions to furnish the materials, and designated prices, terms and conditions, and says to him, if they are satisfactory, he will endorse his acceptance on and return the letter. On the 2d of June, 1866, Frederick J. Hutchings endorsed the acceptance on the letter. The letter, which thereby became the contract, states that fifteen hundred dollars should be paid at the time the proposition should be accepted, "and the balance on the delivery of the goods, about the first day of August next."

The petition avers, that "Sarah Hutchings is the owner of the fee of the tract of land upon which the mill was erected; that Frederick J. was a single man, and resided with his mother, and, although he made the contract in his own name, he, in fact, made the contract aforesaid, with your petitioner, not only for himself, but also for, and on behalf of, the said Sarah Hutchings, his mother, who is not only the owner of the said tract of land, upon which the mill or building stands, but also the owner of the whole, or some certain part interest of the said mill, and that the said contract was made and accepted as well for the interest and benefit of the said Sarah Hutchings as of the said Frederick J. Hutchings, with her knowledge and consent; and the said Frederick J. Hutchings, not only acting for himself in the premises, but also for, and in behalf of the said Sarah Hutchings, as her authorized agent."

The petition also alleges, that while plaintiff in error was engaged in the performance of the contract, Frederick J. Hutchings, for and on behalf of himself and Sarah Hutchings, and with her knowledge and consent, from time to time, ordered other articles of machinery not embraced in the original contract, and thereby interrupted and delayed the performance of the contract first entered into. And that by reason of such alterations, Frederick J. Hutchings was not ready to receive the machinery to be furnished under the written contract, and thereby prevented its full completion before the first day of January, 1867; and that most of the extra machinery was furnished after the first day of August, 1866, and before the first of January, 1867.

That, at different times, the sum of twenty-three hundred dollars was paid to him on the price of the articles of machinery, and that they amounted in the aggregate, to the sum of three thousand five hundred and fifty dollars, leaving a balance due him of twelve hundred and fifty; and that after the contract was entered into, Sarah Hutchings mortgaged the mill and premises to John C. Clark. The petition prays a discovery, that an account be taken, petitioner's lien be established, and that the premises be sold to satisfy his lien. A demurrer was filed to the petition, which the court sustained, and rendered a decree of dismissal, to reverse which this writ of error is prosecuted.

There can be no doubt that a contract, such as creates a mechanic's or material man's lien, may be made by the agent of the owner of the premises to be improved or repaired. To do so, however, he must have authority for the purpose. A general agency to take care of the property, or an agency for other purposes, will not be sufficient. And, in this, there is no hardship, as the title being on record, the mechanic is chargeable with notice that the agent is not the owner, and having that notice, while dealing with a person not having the title, or being clothed with the evidences of title, he should

ascertain the source and extent of the authority before contracting, and, failing to do so, he should bear the consequences of his negligence.

In this case, although not very distinctly and artificially done, it is alleged that Frederick Hutchings made the contract as the agent of Sarah Hutchings, for her use and with her consent. When traversed, such an allegation would require plaintiff in error to prove, by satisfactory evidence, that Frederick was the agent of his mother to make the contract for this improvement. Merely proving that he was her agent for some other purpose, would not be sufficient, nor proof that he was in possession of the property. A party in possession, as a tenant, an intruder, or otherwise, of property of another, by such a contract may bind his own interest, but not that of the owner in the premises, unless the authority to do so has been conferred. *Garret* v. *Stephenson*, 3 Gilm. 261; *Steigleman* v. *McBride*, 17 Ill. 300. Nor, will the mere fact that a person is in possession prove authority. If such were the law, a tenant or mere occupant could do great wrong to the owner. As the lien is a special one, in favor of a special class, it is but reasonable that those who claim it should be required to know when they contract, that the person with whom they contract, has power to create it so as to bind the property.

In support of the decree, it is, however, urged that the machinery was not furnished within the stipulated time, and that plaintiff in error has not shown that it was extended by agreement of the parties, nor shown any sufficient excuse. This contract fully complies with the requirement of the statute, in fixing a time for the delivery of the machinery, and for the payment of the money. In the case of *Roach* v. *Chapin*, 27 Ill. 194, it was said that the objection that no time was fixed by the contract would have been fatal under the act of 1845, but the act of 1861 cured that defect. And in the case of *Kinney* v. *Sherman*, 28 Ill. 520, it was said that the

former act required the contract to be completed within the specified time to secure the lien, unless prevented by the other party. It was there, however, said, that had the contract been made under the law of 1861, it would have been otherwise. That act declares that the law of 1845 shall be held to embrace implied as well as express contracts, in which no time is fixed for the completion of the work, or the furnishing the materials, or price agreed upon for such labor or materials, or for the payment of the money, if the materials or labor be furnished within one year from the commencement of the work, or the commencement to furnish materials.

In this case, the petition avers that plaintiff in error was prevented from completing the contract within the limited period, by Frederick J. Hutchings, who made additions and added extra machinery. If this were proved, it would bring the case within what was said in *Kinney* v. *Sherman*, *supra*, and be sufficient, under the law of 1845. And, it will be observed, that the act of 1861 embraces written contracts as well as those which are verbal. And there was no time specified for the payment of the extra machinery, and they fall within the provisions of that act. And, having failed to deliver the articles embraced in the contract within the time specified, but they having been subsequently delivered and accepted, they would fall under the provisions of the act of 1861, as they were then delivered without any agreement as to time. We are, for these reasons, of the opinion that defendants in error should have been required to present any defense they may have had by answer, and the demurrer was improperly sustained. If, on the hearing, it appear that there were too many parties defendant, the court should dismiss as to those improperly joined From the averments in the petition, we cannot say that Frederick J. Hutchings was an improper party. The contract would bind his interest, if any he held. The decree is reversed and the cause remanded.

Decree reversed.

Syllabus.

JOSEPH E. OTIS *et al.*

v.

THOMAS S. BECKWITH *et al.*

1. TRUSTS AND TRUSTEES—*relative to the enforcement of trusts by courts of equity.* Where a policy of insurance on the life of the assignor, was voluntarily assigned by him to a trustee, for the benefit of his three children, notice of which assignment and trust was given to the company, and also to such trustee, who sent to the assignor his written acceptance thereof, but the policy and assignment remained in the possession of the assignor, and was found after his decease among his other papers: *Held*, in a suit by the trustee against the administrator of the assignor, to compel a surrender of the policy to him as such trustee, and that he be declared the owner thereof:—

1st. That an actual delivery of the policy and assignment thereof to the trustee, was not necessary in order to complete the trust created.

2d. That the acts of the parties—the one notifying the other of the assignment and trust, and his written acceptance thereof, constituted a sufficient delivery to complete the title of the trustee.

3d. That the object sought to be accomplished by the assignor in making the assignment, namely, to make provision for his orphan children, being fully established, equity will carry out such intention, though the transfer be voluntary and without consideration, he never having manifested any desire to retract the act.

2. SALES—*intention of parties—a controling element.* In such cases, equity will look to the substance of the act done, and the intention with which it was done, and in the absence of fraud, carry out such intention, and give it full effect.

APPEAL from the Superior Court of Chicago; the Hon. JOHN A. JAMESON, Judge, presiding.

The opinion states the case.

Mr. GEORGE HERBERT, for the appellants.

Mr. T. A. MORAN and Messrs. MONROE & MCKINNON, for the appellees.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

This was a bill in chancery, exhibited in the Superior Court of Chicago, by Thomas L. Beckwith, claiming to be the assignee of Edward Sacket, deceased, of a certain policy executed by the New York Life Insurance Company, to the deceased in his lifetime, against Joseph S. Otis, the administrator, Hannah L. Sacket, the widow, and Hobart S., George B., Frederick A., and Walter D. Sacket, his heirs at law, and the insurance company.

The bill alleges the policy was for $3,000 upon the life of Edward Sacket, and was delivered to him on or about the 10th of February, 1862, and that he, thereafter, paid up all premiums upon it, and on February 18th, 1862, being desirous of making provision for his three sons, Hobart S., George B. and Frederick A. Sacket, in case of his death, he procured the consent of the company to assign the policy to complainant, for the use and benefit of these three sons, as trustee, and executed and delivered an assignment of the policy to complainant as their trustee, of which, on the 4th of December, 1862, he notified complainant, and asked him to accept this trust, to which, complainant immediately responded, accepting the same. That Sacket died January 17, 1866, leaving, besides these three sons, another son, Walter D., and Hannah L., his widow, his only heirs, and that Otis is the sole administrator.

The bill alleges that this policy, on the death of Sacket, was found with his other papers; that it was the intention of deceased to vest it in complainant as trustee of the three sons named; that the insurance was effected for their benefit, and that deceased, from the time of the assignment until his death, considered it as belonging absolutely to complainant, as trustee for these three sons, and that the policy and assignment attached, and complainant's letter of acceptance, were found folded together, by Otis, the administrator, after Sacket's death.

That Hobart S., George B. and Frederick A., were children by a former wife, and Walter D. was the child of the widow; that the assignment was made for the benefit of the three first named sons, for the reason that the other and youngest son would inherit of his mother, who had property in her own right, to an amount much exceeding the life insurance and other property left by the deceased.

The bill further alleges, that complainant demanded the policy of the administrator, Otis, who refused to surrender it, on the suggestion of the widow, who claimed it as part of the personal estate of her deceased husband.

Complainant claims the legal and equitable title to this policy, and denies any right, legal or equitable, in the administrator to the policy, or to the possession of the same, and says, the insurance company are ready and willing to pay the same to him when he produces the policy, which he is unable to do, and because it has been notified, by the administrator, not to pay it to him.

The prayer is, that the administrator surrender the policy to complainant, and that he be declared the owner thereof, as trustee, and for general relief.

The policy is made exhibit [A], and it provides, that if assigned, a copy of the assignment shall be given to the company, and it is as follows:

"CHICAGO, February 18, 1862.

"For value received, I hereby assign all my right, title and interest in the within policy, to Thomas S. Beckwith, of Cleveland, trustee for my children, to be divided in equal sums of $1,000, as follows, viz.: $1,000 to Hobart Sterling Sacket; $1,000 to George Beckwith Sacket, and $1,000 to Frederick Augustus Sacket.

"EDWARD SACKET.

"*Signed in presence of* C. L. NORTH."

Exhibit "B" is as follows:

"CHICAGO, February 18, 1862.

"For value received, I hereby assign my right, title and interest in the within policy, 16,289, in the New York Life Insurance Company, of New York, to Thomas S. Beckwith, trustee, of Cleveland, for my children, to be divided in equal sums of $1,000, as follows, viz.: $1,000 to Hobart Sterling Sacket, $1,000 to George Beckwith Sacket, $1,000 to Frederick Augustus Sacket.

"EDWARD SACKET.

"*Witness*, MILLS OLCOTT."

"The above assignment noted on company books.

"THOS. M. BANTA, Cashier."

Exhibit "C" is as follows:

"CLEVELAND, December 6, 1862.

"Mr. EDWARD SACKET, *Chicago, Ill.:*

"Dear Sir:—You having made me, for your children, a trustee in the matter of a life policy insurance on your life, in the New York Life Insurance Company, for three thousand dollars, is satisfactory, and I accept the trusteeship.

"Yours truly,

"T. S. BECKWITH."

Otis, the administrator, answered, denying any equity in the bill, admitting himself to be sole administrator, and claiming the policy and money due upon it, as assets of the estate.

The infant defendants answered by guardian *ad litem*, also denying the equities of the bill, and calling for proof.

H. L. Sacket, the widow, answered at length, admitting the policy, and that it was in the hands of Otis, but denies consent of the insurance company to its assignment, and denies deceased ever made or executed any assignment of the policy,

or notified complainant of what he had done, or asked him to act as trustee, but insists that the policy, with the endorsement upon it, was always in the possession of deceased, until the day of his death, and that the pretended assignments were without consideration, and were never out of the possession or control of deceased, and were left with respondent, at deceased's dwelling house in Chicago, with his deeds and other papers, when he went on his last journey to Wisconsin, where he died; and neither of them was ever delivered to complainant, nor to any one in his behalf, and that they remained in his possession until after his death, when they were deposited in a banking house for safe keeping, and that complainant's letter of acceptance was casually found among the other letters of deceased, and placed with the other papers, but was not found with the policy, or with the pretended assignment thereof. Denies the intention of deceased to vest the policy in complainant, averring that deceased always controlled the assignment and kept possession of it, so that it should not vest in complainant absolutely, and that deceased might, from time to time, in his lifetime, make such other or different disposition of it as he might deem just and reasonable, and avers, that he failed to carry any legal transfer into effect, and that the title to the policy, neither in law nor in equity, ever vested in complainant, whatever he intended, and she claims, that it belongs to the estate of deceased, and insists that the assignment was inoperative, void, voluntary, and without consideration.

This is all that is necessary to extract from the answer, as thereby, the points in controversy are distinctly presented. Replications were put in, and testimony taken, establishing the material facts charged in the bill, and on the hearing, the court found that the insurance was effected, and at the time of effecting it, the assured intended it for the benefit of his three sons by his first wife, and after notifying complainant, assigned the policy to him in trust, for the three sons, and

endorsed it on the policy, of which fact, deceased notified the insurance company, defendant, and it was noted on the books of the company, and of which assignment in trust, complainant had notice on or before December 6, 1862, and accepted the trust; that Edward Sacket died January 17, 1866, and that the policy and assignment thereto attached, were found among his papers, and also the letter of acceptance of complainant; that Otis was administrator, and took possession of the policy and assignment, and refused, on demand of complainant, to surrender it to him.

The decree further finds that, by stipulation, the amount due on the policy, being $2,938.39 cents, was paid Otis, who now holds the money subject to the order of the court, and the court ordered and decreed that the same be paid by Otis to complainant.

To reverse this decree, Otis, H. S. Sacket and Walter D. Sacket, appealed to this court, assigning the same for error.

Appellants make the point, that neither the policy, nor any assignment of it, was ever delivered to complainant, or to any person for him. That the assignments were not under seal—they were voluntary and without any pecuniary or valuable consideration, and without any previous agreement, or legal obligation to make any such assignment; that the assignment did not take effect for want of delivery—that they were imperfect and mere inchoate acts, not complete without delivery, and that the legal title to the policy, and to the money payable on it, did not pass to, or vest in complainant, but remained the property of Edward Sacket, and subject to his control until his death, and the money is assets of his estate, and having been paid to the administrator, it is in the right hands and should there remain.

Appellants' counsel has cited a vast number of authorities, supposed to sustain these several points, giving evidence thereby, of the very thorough investigation to which the case has been subjected, which we have examined, especially the

case of *Antrobus* v. *Smith*, 12 Vesey 39, which counsel says, "was on all fours," with this case. This being so, we have given that case a close examination and will state it from the books, as we understand it:

One Gibbs Crawford was entitled to ten shares, of one hundred pounds each, in the Forth & Clyde Navigation. He wrote, upon the receipt for one of the subscriptions, and signed the following endorsement, dated October 4, 1790: "I do hereby assign to my daughter, Anna Crawford, all my right, title and interest, of, and in the enclosed call, and all other calls, of my subscription in the Clyde & Forth Navigation."

Anna afterwards married Antrobus, and died on the 18th June, 1793. Her father died in October of the same year, and her husband in April, '94. Anna Crawford, the widow of Gibbs Crawford, and mother of Mrs. Antrobus, died in '97, and a short time after her death, the elder of her two sons, both of whom, under the execution of a power of appointment given to her by the will of her husband, took the residue of his personal estate, in searching a closet in the country-house of his father, found the receipt above stated, with the endorsement upon it, in a pocket-book, which had belonged to his mother, with other papers relating to his father's personal estate, and securities for moneys due to him.

The bill was filed by the brother and personal representative of John Antrobus, praying that a proper assignment of the canal share may be executed, and that the receipts given on that amount may be delivered up.

The two sons of Mr. Crawford stated in their answer to this bill, and it was proved, that subsequent to the date of the indorsement on the receipt, their father considered himself as the owner of that share, and in 1791-2, sat, constantly, as one of the committee and as a director, having no other interest in the Navigation except that share or subscription. They also represented, that the portion of £10,000 given by Mr. Crawford, upon the marriage of his daughter, was intended

to be in lieu of all claims and demands whatsoever, by her or her husband.

The defendants, with their answer, filed a cross-bill, which the plaintiff, Antrobus, answered, and therein stated, that he was informed by his brother that, in a conversation respecting the canal share, Anna said to her father, "You know, father, you gave me £1,000 of that stock;" upon which he answered, "Yes; but you will recollect that I have since given you £10,000 which has done that away."

It was proved by the scrivener employed to prepare the settlement upon the marriage of Mr. and Mrs. Antrobus, that it was agreed that Mr. Crawford would give £10,000 as a marriage portion, which should be accepted by her in full of all her other claims upon his estate and property; and the witness had been before informed by Mr. Crawford, that he had given his daughter a share in the Forth & Clyde Navigation; and at the time the settlement was progressing, he informed the witness that he considered £10,000 as a large portion, but it was to be in lieu of that, and of every other claim of his daughter under the settlement, or deed of appointment, or otherwise.

It was argued, on these facts, for the plaintiff, that a voluntary conveyance, though defective, will be executed by chancery, if intended as a provision for a child, citing *Bonham* v. *Newcomb*, 2 Ventris, 365, and a passage in *Colman* v. *Sarvell*, 1 Vesey, 50.

Counsel for defendants, the sons of Crawford, contended, that to induce the court to act, to effectuate a gift *inter vivos*, there must be a valuable, or at least a meritorious, consideration, citing authorities. They argued, that the court had never proceeded upon a voluntary instrument kept in the possession of the party, to perfect an inchoate act that never was completed; at least, the intention ought to be clear, direct, and unequivocal, and if manifested by writing, that writing ought to have been delivered. They admitted, that a gift without

consideration was good, but was revocable before delivery. The subsequent facts destroyed all color of title, which, if it could be supposed existed originally, was satisfied and extinguished upon the marriage of Mrs. Antrobus, and a particular intention to the contrary, appears by the evidence.

Counsel for plaintiff argued, that the father meant to make himself a trustee for his daughter, of these shares, and the paper should be considered a declaration of trust; that the doctrine, as to voluntary provision, was never applied by a father to his child; that the distinction was continually taken with reference to the natural obligation.

Upon this remark by counsel, the Master of the Rolls, Sir WILLIAM GRANT, one of the ablest chancery lawyers of whom England can boast, who heard the cause, put this question: "Do you recollect any instance in which the party was compelled to perfect the gift, even in favor of a child?" The answer was, the relief does not require that any act should be done, this being a declaration of trust.

The Master of the Rolls, in deciding the cause, said: "I do not see how this assignment can be decreed. The facts of the case are in great obscurity. That must operate unfavorably to the plaintiff, for this paper comes out of the possession of the executrix of Mrs. Crawford. The presumption, therefore, is, either that it has always remained in his possession, or, that if ever parted with, it had been delivered back to him. Upon the latter supposition, taken with the provision made upon the marriage, there is an end of the question." After commenting on the absence of proof of delivery to the daughter, the court proceeds: "When there is a voluntary and imperfect gift of this kind, the party reserving the instrument in his own power, during his whole life, is it possible, after his death, to enforce a specific performance of the engagement which that instrument contains, or to enforce a legal execution of that assignment which it purports to make; taking into consideration that the parent did not die without having

expressed an intention, upon his part, not to carry into execution that gift; for it is evident that Mr. Crawford himself never would, unless compelled, have acted upon this assignment; that he never would have done anything to perfect it, which appears from his declarations to his daughter and to Silverfork (the scrivener), both purporting that he considered this gift as completely at an end, as done away with, by the provision made upon her marriage." Then the court puts the question: "Has a case ever occurred, in which a court of equity has interfered to give effect to an instrument attended with these *two* circumstances: 1st. That there is no evidence that the parent ever parted with the possession of it; 2d. a declared intention, by him, not to act upon that instrument, or to give effect to it, having died with the conception, that he was owner of the property, which he, at one time, intended to give away?"

The court further says: "He meant a gift. He says he assigns the property. But it was a gift not complete. The property was not transferred by the act. Could he, himself, have been compelled to give effect to the gift by making an assignment? There is no case in which a party has been compelled to perfect a gift, which, in the mode of making it, he has left imperfect. There is *locus pœnitentiæ*, as long as it is incomplete, and *Mr. Crawford did repent;* that is, he changed his mind upon what he then thought a sufficient motive; not merely from caprice, but the situation of his daughter was no longer that under which he made this imperfect disposition in her favor. In order to have any effect, he must have been compelled to give it effect, by suit in this court. This is not a case in which nothing was done, during the life of the party, showing an *alteration of intention.*"

We have been thus particular in stating this case, for the reason appellants' counsel relied upon it as decisive; he says it runs "*quatuor pedibus*" with the case at bar.

We do not think the case is like this, in principle, and certainly not in the facts.

The grounds on which the Master of the Rolls decided this case, are found in the question he put: "Has a case ever occurred, in which a court of equity has interfered to give effect to an instrument attended with these *two* circumstances: 1st. no evidence that the parent ever parted with the possession of the instrument, and 2d. a *decided intention* by him *not to act upon that instrument, or to give effect to it*, having died with the conception that he was owner of the property which he, at one time, intended to give away."

If the case had not been attended with those *two* circumstances, is it to be supposed it would have been decided as it was decided? Did not the last named circumstance have great force in compelling the conclusion? Does it not figure in all the reasoning of the court? This case wants the second circumstance on which such stress is laid, and there is another feature in it, which Antrobus' case had not, and it is this:

The assignment in that case was not complete—it was executory, a mere agreement to assign, and the bill was filed to compel an assignment. The prayer was, "that a proper assignment of the canal share may be executed." In this case, the assignment to complainant was fully executed—the assignee accepted the trust, by writing addressed to the donor —the insurance company were notified of the transfer of the policy, and they noted it on their books. The donor never revoked, if he had the power so to do, but died, to use the language of the Master of the Rolls with slight alteration, with the conception that, with the proceeds of the policy, his helpless children would be secured in a small pittance, when he no longer could contribute to their support. The donor, at no time, declared any intention, or manifested any desire to retract, but the contrary. He did, it is true, on the occasion of the oldest son arriving at age, inquire at the insurance office if the policy could be changed, and made for the benefit of the

two minors; but no change was made. The assignment, so far as the act of deceased could effect it, was executed—the assignee accepted the trust thereby created, and the debtor party was duly notified, and entered the fact on their books, but the policy and writing of assignment remained with the assignor up to the time of his death, and were found, attached together, among his valuable papers, by his administrator, after his death, who refuses, on demand made, to surrender it to the assignee, the complainant. This want of actual delivery to the assignee, is held, by appellants, as fatal to complainant's case. The general principle is admitted, that deeds take effect from their delivery and acceptance, and they must be mutual and concurrent acts, but the books are full of cases showing exceptions to this rule, as where a deed of land was made by a father, in favor of an illegitimate child of tender years, and placed on record by the father, this court held there was a delivery and acceptance. *Masterson* v. *Cheek*, 23 Ill. 72. And in Antrobus' case, the Master of the Rolls admits there were cases in which a voluntary conveyance, kept in possession of the party during his life, and in his possession at the time of his death, had been held to operate against his will, in which he disposed of the same property. Those were cases where there was a complete conveyance, a transfer in law of the property —nothing requisite to add to the validity of it—the instrument permitted to remain uncanceled. Yet, in those cases to which allusion is made, no delivery of the deeds was shown or pretended, but the contrary—they were not delivered.

In this case, the assignment was of a chose in action, which the law did not require should be recorded, but the debtor party had notice of the assignment, and entered the fact on the books of the company, and the assignee accepted the assignment, in writing. Was delivery of the policy to the assignee, essential to perfect the assignment? Was not the gift of this policy as complete as the nature of the thing and subject admitted? The policy was, in fact, assigned, and the

aid of the court was not invoked to compel an assignment. All had been done by the assignor that was incumbent on him to do. He notified the assignment to the assignee, and attached it to the policy, retaining both in his own possession. The facts of the case do not differ essentially from the facts in the case of *Fortescue* v. *Barnett*, 3 Mylne & Keen, 36.

In a note to sec. 433, 1 Story's Eq. Jur., that case is stated to be, a case of a voluntary assignment of a bond, and the bond not delivered, but kept in the possession of the assignor, it was held, a court of equity, in the administration of the assets of the assignor, would consider the bond as a debt due to the assignee, no further act remaining to be done by the assignor. The court say, there is a plain distinction between an assignment of stock, where the stock has not been transferred, and an assignment of a bond. In the former case, the material act (the transfer) remains to be done by the grantor, and nothing is, in fact, done, which will entitle the assignee to the aid of the court until the stock is transferred; whereas, the court will admit the assignee of a bond as a creditor.

Upon this ground, where A made a voluntary assignment of a policy upon his own life, to trustees for the benefit of his sister and her children if they should outlive him, and he delivered the deed of assignment to one of the trustees, but kept the policy in his own possession, and afterwards surrendered the policy to the office for a valuable consideration, and a bill was brought against A by the surviving trustee in the deed, to have the policy replaced, it was decreed accordingly. The court said, that the gift of the policy was complete, without a delivery; that no act remained to be done by the grantor to complete the title of the trustees, and, therefore, it was not a case where the court was called upon to assist a volunteer. This case differs from the one under consideration, only in this, that in the case reported, the assignment of the policy was delivered to the assignee, the policy remaining with the donor. Here, the assignment was not, in fact, delivered, but

equivalent acts were done by the donor and assignee, the one notifying the assignee of the assignment and trust, and his written acceptance thereof, and notice to the insurance company, which was noted on their books.

The general principle, advanced in the books, that a court of equity will not enforce a voluntary contract, is to be understood with proper qualification, for they abound in cases where such a contract has been enforced. For example, if there be a voluntary contract *inter vivos*, and something remains to be done to give it effect, if it be a voluntary contract to transfer stock, and the stock is not transferred, a court of equity will not enforce the transfer. But if the stock is actually transferred, then a court of equity will enforce all the rights growing out of the transfer, against anybody. 2 Story's Eq. Jur. § 433. This is the nature of the cases of *Ellison* v. *Ellison*, 6 Vesey 662; *Coleman* v. *Sarvell*, 1 Vesey, 50; *Palantoft* v. *Palantoft*, 18 ib 91, cited by appellants. Here, the policy was actually assigned, accepted in writing, and noted on the books of the company, all which we regard as equivalent to an actual delivery of the assignment to the complainant.

In the same treatise, Justice STORY, in treating of the "delivering up of instruments," in sec. 705, gives some examples where the instrument was not delivered during the lifetime of the party executing it, but was enforced by decree. Where a nephew gave a note to his uncle, for a sum of money, and afterwards the uncle wrote the following entry, "H. J. P. (the nephew) pays no interest, nor shall I even take the principal unless greatly distressed," and upon his death, the creditors found the entry, it was held a good discharge of the note at law. *Aston* v. *Pye*, 5 Vesey, 350. So, where a son-in-law was indebted to his father-in-law, on several bonds, and by his will the latter left him a legacy, and from some memoranda of the testator, it was satisfactorily shown that the testator did not intend that these bonds should be enforced by the executors, it was decreed that they should not be the subject of any

demand by the executors against the son-in-law, *Eden* v. *Smyth*, ib. 340; and to the same effect is *Flowers* v. *Masters*, 2 Mylne and Craig, 459. Another instance is given, where a testator, on his death-bed, said to his executrix, that he had the bond of B, but when he died, B should have it, and that he should not be asked or troubled for it. The executrix, after the testator's death, put the bond in suit, and thereupon B brought a bill for a discovery and delivery up and cancellation of the bond, and it was decreed accordingly, at the hearing, by the Lord Chancellor, and his decree was affirmed by the House of Lords. *Wekett* v. *Roby*, 3 Bro. Parl. Cases, 16.

In neither of these cases was there any valuable consideration for the promise, nor any delivery of such writing as was made, and in one case, the last, the gift was by parol. The grounds of the decision, manifestly, were, that the intention was fully established by the evidence; and in nearly all the cases cited, on both sides of this case, it will be perceived, from *Antrobus* v. *Smith*, decided in 1806, to the later cases, that the intention of the parties is an important consideration, and, in fact, a controling element.

Suppose the intestate, in this case, on his death-bed, had directed his administrator to hand over the policy for the benefit of his three sons, to complainant, on the authority of the last cited case, a court of equity would have enforced the request. It by no means follows, judging from these cases, that there must be a delivery of the instrument on which a right is based, or a valuable consideration, if the intention of the party can be plainly perceived. That, the court, in the absence of fraud, will carry into full effect.

Can there be any doubt of the intention of the intestate in this case? And was not the object he sought to accomplish by the assignment of the policy, one pure and holy, commending itself to the right, reason and sense of justice of every one? Equity, discarding unmeaning and useless forms, will look to the substance of the act done, and the intention with

which it was done, and carry out the intention. A delivery of the assignment to complainant, at the time it was made, was not necessary for any then existing purpose, as the policy was inert and unproductive during the life of the assured, and when, on his death, it became important the assignee should have the policy, in order to recover the proceeds of the company the evident and unquestioned intention of the donor is frustrated by his administrator, and that which he intended as a provision for his orphan children is sought to be appropriated as assets of the estate. There is neither justice nor equity in this, the intention being so manifest in the other direction.

We have examined the case, thus far, with reference alone to the acts and intention of the intestate, and from them we are satisfied that he did all that was expected for him to do, in order to complete the transfer of the policy, and he kept the gift alive by paying the premiums, the last one in advance, and died under the conviction he had provided for his orphan children.

But the case is presented in another aspect by appellee's counsel. They take the ground, that the acts done which we have commented upon, amount to a valid and complete declaration of trust, which equity will enforce against the estate of the donor for the benefit of the *cestui que trust.*

This phase of the case has been presented with great ability by counsel on both sides, and numerous authorities cited, which we have fully examined. As appellee's counsel place great stress upon one of them, as of controling force, we have contented ourselves with the study of that case. It is the case of *Kekewich* v. *Manning*, 1 DeGex, McNaughton and Gordon, 176. It was decided in 1851, by the Lord Justice of the Court of Appeals, and reported by Mr. DeGex, the opinion by the Lord Justice KNIGHT BRUCE. It is unnecessary to state very fully the particulars of the case, as they are manifold, and the points in it can be well understood without their being stated in detail.

In 1834, a sum of £10,500, 3½ per cent. bank annuities, and a sum of £500 per annum, Long annuities, were standing in the joint names of Mrs. Elizabeth Kekewich, and her daughter Susanna, in the books of the bank of England. The property was derived, immediately, from Robert Kekewich, the deceased husband of Elizabeth, and the father of Susanna. Under his will, these persons held these sums, as trustees, for their own benefit, for Mrs. Kekewich, for life, and subject thereto, for the absolute benefit of Miss Susanna. Having, between them, the whole beneficial, as well as legal interest in the property, Miss Susanna, having obtained her majority, agreed to marry Sir Henry Maturin Farrington, and in contemplation of the marriage, executed a deed of settlement, dated February 1, 1834, in which Sir Henry joined. Soon after the execution of this instrument, the intended marriage was solemnized. Sir Henry died soon after, having no issue by the marriage. Mrs. Kekewich was not a party to the deed, but cotemporaneously with it, she had notice of it. She survived Sir Henry several years, and died shortly before the institution of this suit. Upon her death, the legal title to the bank annuities, vested, by survivorship in Lady Farrington solely, and so continued. But, between the deaths of Sir Henry and Kekewich, certain trusts of the bank annuities were, for a valuable consideration, created by Lady Farrington so far as she could, and declared by her, which are at variance with the trusts of the settlement of 1834, and opposed to them, and the question in the cause was, whether against the present wishes of Lady Farrington, who now desired to resist and defeat the settlement of 1834, that settlement ought to stand and prevail, the legal title having, continually and uniformly, remained as it was when the settlement of 1834 was made, and the dealings of Lady Farrington with the property having had effect, if at all, only as to the equitable title.

To perceive, more clearly, the point of the question, it is necessary to state the settlement of 1834.

The three per cents and the Long annuities were, by the deed, transferred to those trustees, subject to the life interest of Mrs. Kekewich, upon certain trusts, for the benefit of Susanna, until her intended marriage should be solemnized. The trusts, after the marriage, were for Susanna for her life, for her separate use, and after her demise, as to the £500 Long annuities, in trust for Sir Henry Farrington for his life, and after the decease of the survivor, as to the whole of the trust funds, upon such trusts as Elizabeth Bradney (who was a neice of Susanna), and the children of the intended marriage, and for the issue of Elizabeth Bradney, and for the issue of the children of the intended marriage, as Susanna Kekewich should appoint, and in default of appointment, for Elizabeth Bradney and such children equally, as tenants in common. Provision was made in case there were no children of the marriage, that £5,000 of the stock, upon the death of Susanna, should be held in trust for Elizabeth Frances Bradney, for her own benefit, and become vested in her, on her attaining the age of 21, but not to be transferable until after Susanna's death.

In 1838, Lady Farrington married a Mr. Manning, in contemplation of which, another settlement was made, dated in June, 1838, whereby the stock and Long annuities were assigned by Lady Farrington to George Manning and another, upon trusts, after the demise of Lady F., for such of them, Elizabeth Frances Bradney and the children of the second marriage as Lady F. should, by will, appoint, and in default of appointment, for the children of the marriage equally, and if there should be no such children, as to £5,000 stock, part of the £10,500 stock in trust for Elizabeth Frances Bradney, if she should survive Lady Farrington. There was one child the issue of the second marriage. The second husband died in

1844, and Mrs. Kekewich, the widow of the testator, died in 1847.

The bill was filed by the trustees of the settlement of 1834, and John Bailward and Elizabeth Frances Bradney, his wife, against Lady Farrington, the trustee of the settlement of June, 1838, and the child of the second marriage, praying that Lady F. might be ordered to transfer the stock, or £5,000 part thereof, and the Long annuities, into the names of the trustees of the settlement of 1834, upon the trusts therein expressed, and that the same might be executed under the direction of the court, and that Lady F. might be restrained from transferring the said fund into the names of the trustees of the second settlement, or of any persons other than the plaintiffs.

The defendants insisted upon the power of Lady Farrington to make the second settlement, notwithstanding the existence of the deed of February, 1834, and they claimed under the second settlement accordingly.

The vice-chancellor dismissed the bill with costs, and on appeal to the Lord Justices, it was argued for the appellants, as it is here by the appellees, that even if the trust in the deed of February, 1834, was voluntary, still it was a complete gift, since everything was done of which the subject was susceptible, and to hold the gift to be ineffectual, would be to say, that an instrument of that description could not be assigned, except for value. On this point, reference was made to a large number of authorities: 2 Keen, 123; 1 Keen, 551; 3 Beavan, 238; 3 Mylne & Kean, 36; *Ex parte Pye*, 18 Vesey, 148; 4 Beavan, 600; 6 Vesey, 663, and Sug. on Ven. and Pur. 1,119.

The appellees contended, that appellants were volunteers, and the court could not assist a volunteer, if the gift is not complete, and anything remains to be done, and that the transaction was imperfect—there was no declaration of trust, nor was the legal estate in the appellants—they were obliged to come to a court of equity to enforce the assignment. The

settlement is not, in form or substance, a declaration of trust, it is an assignment—the court will not convert an imperfect gift into a trust, citing *Halloway* v. *Headington*, 8 Simon, 328; *Antrobus* v. *Smith*, 12 Vesey, 39; *Edwards* v. *Jones*, 1 Mylne & Craig, 226, cited by appellants here, and other cases.

The prominent fact in the case is, that Elizabeth Bradney was not a party to either of the settlements, and the provision in the deed of settlement of Feb., 1834, was wholly voluntary on the part of Miss Kekewich, and without any valuable consideration. It was for these reasons the vice-chancellor dismissed the bill.

The Lords Justice, on appeal, reviewed by the Lord Justice KNIGHT BRUCE, the cases cited by appellant here, and commented on them.

The learned Justice, after stating the grounds of the plaintiffs' claim, and in what right they sue, says: "The defendants resist the claim on the ground that, as the defendants insist, the provision, purporting to be made for Mrs. Bailward (Elizabeth Frances Bradney), by the deed of 1834, was one merely of a voluntary kind, was nothing more than an intended, or promised, gift, not perfected, not completed, and ought, therefore, not to be enforced, either at her instance, or at that of the trustees of the deed, by a court of equity. They contend, in terms, that neither Lady Farrington nor her mother, ever became a trustee of the funds for the purposes of the settlement, or at least, for the benefit, to any extent or in any event, of Mrs. Bailward. After reviewing the several clauses in the deed of 1834, the court concluded: "We consider the plaintiffs entitled to a decree." But it was on the assumption the court was not precluded by authority, from acting on their own opinion of what was right. They then review the authorities cited by appellants here, and say: "We dispose of the cause on the authority of *Ellison* v. *Ellison*, 6 Vesey, 656; upon *Canogan* v. *Sloan*, Sug. Ven. & Pur. 1,119, and

upon principle chiefly, but secondarily also upon *Fortescue* v. *Bennett*, 3 Mylne & Keen, 36; *Wheatly* v. *Pim*, 1 Keen, 551, and *Blakely* v. *Brady*, 2 Drury & Walsh, 311, in the plaintiff's favor." The most of these cases are cited by appellants here, in support of an antagonistic view of the case. The appellees here are in the position of appellants before the Lord Justices on appeal, and all that is determined in their favor is favorable to these appellees, and supports their view of the case.

This case reviews all the learning contained in the many cases referred to by the appellants, and we cannot but express some surprise that there should be such variety of opinions on the questions discussed, and we may say, conflicting opinions. They are not all reconcilable. The last case commented on, *Kekewich* v. *Manning*, we are willing to take as the latest and best exposition of a subject, which seems to have perplexed the courts of England, and which may not, even now be considered as fully settled.

We place the most stress upon the first point discussed, and that is, the intention of the donor. He created the fund, apparently for the benefit of his motherless children, he did all in his power to confer upon the trustee the necessary authority to receive this fund for those children, when he should be no more; he was prompt in keeping the policy alive, by the payment of the premiums; at no time did he manifest any desire to retract, and though he occupied *locus pœnitentiæ*, he did not repent of his act, but left the world with the conception that those so dear to him had been provided for.

We see nothing in the case to justify us in frustrating this intention, but every consideration impelling to give it full force and effect.

The decree of the circuit court is affirmed.

Decree affirmed.

DAVID FORD

v.

GEORGE C. HIXON.

1. INTEREST—*where no rate agreed upon.* In a contract for the payment of money, where no rate of interest is agreed upon, the legal rate is six per cent.

2. SAME—*recovery of—no rate agreed upon.* And in an action upon such contract, it is error to render a judgment allowing a greater rate of interest.

WRIT OF ERROR to the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an action of assumpsit, brought by the defendant in error, against the plaintiff in error, in the Superior Court of Chicago, to recover the sum of five hundred dollars. The cause was tried before the court and a jury, and a verdict found for the plaintiff below for $535.25. A motion for a new trial was overruled, and judgment rendered on the verdict, to reverse which, the case is brought to this court by writ of error.

Mr. A. C. STORY, for the plaintiff in error.

Messrs. HURD, BOOTH & KREAMER, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The judgment must be reversed in this case, because it is for too large a sum. The jury evidently allowed interest at the rate of ten per cent. on the money borrowed. For this there was no warrant, as there had been no contract in regard

to the rate of interest, and in such cases the legal rate is six per cent.

The judgment must be reversed and the cause remanded

Judgment reversed.

HARVEY POWELL

v.

LAUGHLIN FEELEY.

1. ACTION—*before justice of the peace.* Where a plaintiff files an account before a justice of the peace, upon which suit is brought, and in it he charges the defendant was guilty of fraud, the plaintiff may recover although no fraud is proved, if he only establish a right of recovery of which the justice has jurisdiction. And the same practice obtains on a trial of an appeal in the circuit court.

2. JURY—*their discharge by the court.* Where a circuit judge directed a jury, on their retirement, that they could reduce their verdict to writing, seal it, leave it with the clerk, and then be discharged for the term, such action can not be assigned for error, unless the party at the time objects, and preserves the question in a bill of exceptions.

3. VERDICT—*weight of evidence.* This court will not disturb a verdict unless it is manifestly against the evidence in the case.

APPEAL from the Circuit Court of Knox county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Feeley sold Powell two hundred and twenty-seven bushels of wheat, Powell agreeing to pay the highest price paid that day at Oneida, and upon this condition Feeley let Powell have the wheat. Powell paid Feeley two hundred and twenty-seven dollars, or at the rate of one dollar per bushel, and Feeley claiming that the wheat, when delivered, was worth more,

and that he could have got more than the one dollar per bushel, but, relying upon the promise of Powell, delivered it to him, brought his suit before a justice of the peace, upon the following account:

"*Harvey Powell,*

To LAUGHLIN FEELEY, *Dr.*

To balance due on sale of wheat, by virtue of misrepresentations of said Powell, at the time of said purchase and sale, $75 00

The trial resulted in a verdict and judgment against Powell for thirty-eight dollars damages. The defendant appealed from this judgment to the circuit court, where a trial was had before the court, and a jury, who returned a verdict upon which a judgment was rendered, affirming the former judgment. The defendant brings the record to this court by appeal, and asks that the judgment be reversed, and assigns as a reason the erroneous instructions given for the plaintiff, on the trial of the cause in the court below.

Mr. F. C. SMITH, for the appellant.

Mr. J. B. RICE, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It has been so long and so frequently held by this court, that in a suit before a justice of the peace, the pleadings being oral, a party is entitled to recover if he established any cause of action of which the justice of the peace had jurisdiction, and this, too, by whatever name he may call his action, that we deem it unnecessary to discuss the question raised on the first of appellee's instructions. It could not matter if he, in his account, did say that appellant was guilty of fraud in

the purchase of the wheat. That did not deprive appellee of proving that appellant owed him for the wheat. To so hold would render trials before justices of the peace highly technical, where the legislature has properly intended to dispense with all technicality. It does not matter by what name a plaintiff in that court designates his action, if he but proves a cause of action falling within the jurisdiction of the justice.

Only a part of the instructions are set out in the abstract, but we have referred to the record, and there find that the same instruction, in slightly a different form, was given, as that which the court refused to give for appellant, and numbered five in the series. A careful examination of all the instructions given, shows that they fairly presented the case to the jury.

It is urged, that the circuit court erred in directing the jury when they retired to consider of their verdict, that when they agreed, they could reduce it to writing, seal it, deposit it with the clerk, and then be discharged from further attendance on the court during the term. It nowhere appears that appellant interposed any objection to this direction of the court. Had appellant objected to it, he should have made it known to the court, and if not allowed, he should have preserved his objection in a bill of exceptions. It was his right to have the jury polled if he had not waived it. But failing to object to the course pursued by the court, he waived the right, and can not raise it for the first time in this court. A party has no right to stand by and permit steps to be taken in his case without objection, and if the result does not favor his interest then raise objections.

An attentive examination of the evidence satisfies us that it sustains the verdict. It is only in cases where the verdict is manifestly against the evidence that this court will disturb the finding of a jury. Such is not the case on this record, and the judgment of the court below must be affirmed.

Judgment affirmed.

Syllabus.

TALMON F. HANFORD

v.

JACOB OBRECHT.

1. CHATTEL MORTGAGE—*irregularity in the foreclosure proceedings—does not invalidate the mortgage.* The validity of a chattel mortgage is not affected by reason of an irregularity in the proceedings to foreclose it.

2. STAMPS—*instruments offered in evidence in the courts of this State—require no stamps.* Instruments are not required to be stamped to be evidence in the courts of this State. And no unfavorable inference can be drawn against the party offering such unstamped instrument, by reason of the want of a stamp.

3. PRACTICE AT LAW—*objections to evidence—must be made at the time it is offered.* The correct practice is, that an objection to evidence, thought to be improper, must be made at the time such evidence is offered, stating the reasons for such objection, which, if not sustained, an exception must be taken to the ruling of the court admitting it.

4. SAME—*of evidence not objected to.* This court does not favor the practice of excluding from the jury evidence which has been admitted without objection.

5. EVIDENCE—*relative to particular facts and issues.* Where, on the second trial of an action of replevin, the plaintiff, to prove his title to the property in controversy, introduced in evidence a bill of sale purporting to have been made to him by the purchaser of such property at a mortgage sale thereof: *Held*, that it was proper for the defendant to show that such bill of sale was not introduced in evidence on the former trial, and thereby place the plaintiff in a situation requiring an explanation of why he failed to produce it.

6. SALES—*of personalty—to bind creditors and subsequent purchasers.* A sale of personal property, to be binding on creditors and subsequent purchasers, must be entered into in good faith and for a valuable consideration, and not with intent to hinder or delay creditors.

7. INSTRUCTIONS—*must be based upon the evidence.* It is error for the court to give to the jury an instruction which is not based upon the evidence.

8. CHATTEL MORTGAGES—*possession by mortgagor after default.* The principle is well settled, that where a mortgagor of chattels retains the possession of the mortgaged property, by or through the act of the mortgagee, after default made, such retention is fraudulent *per se.*

9. But where, after the default of the mortgagor, a sale of the property under the mortgage is had, and purchased by a third party, in good faith and for a

valuable consideration, who leaves it in the possession of the mortgagor, then, possession so acquired by the mortgagor would be lawful.

10. VERDICT—*in replevin.* In an action of replevin, the pleas were—1st, *non cepit*; 2d, property in the defendant; 3d, property in third person, and 4th, justification of the taking under an execution against such third person. The verdict was, under the direction of the court, "We, the jury, find the defendant not guilty, and the right of special property to be in the defendant." *Held*, that this was error. The verdict, in such case, should have been, We, the jury, find the issue for the defendant; that the property was the property of the party defendant in the execution.

APPEAL from the Circuit Court of Kankakee county; the Hon. CHARLES H. WOOD, Judge, presiding.

The opinion fully states the case.

Mr. THOMAS P. BONFIELD, for the appellant.

Mr. STEPHEN R. MOORE, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

This was an action of replevin, brought to the Kankakee Circuit Court, by Talmon F. Hanford, against Jacob Obrecht, the sheriff of that county, who had levied an execution in his hands, in favor of Otto Immelt, against Talmon Hanford, on the property in question.

The property consisted of household furniture chiefly, and it appeared that Talmon Hanford was the father of Stephen F. Hanford and also of the plaintiff, and that he did, on the 14th of April, 1862, execute a mortgage to Stephen of the property, conditioned, if he should pay Stephen five hundred and fifty dollars, with ten per cent. interest, on the 14th of April, 1864, being the amount of a promissory note of that date, then the mortgage was to be void. In default thereof, Stephen might seize the property, and sell it at public or

private sale, to the highest bidder for cash, after giving ten days' notice of the time and place of the sale, together with a description of the property to be sold, in at least five of the most public places in the vicinity of the place where the sale should be had, to satisfy the debt.

On the 25th of April, 1864, Stephen executed a bill of sale of this property to the plaintiff, his brother, which recites the making and the terms of the mortgage from his father, Talmon, and then states that on the 14th day of April, 1864, the money due by the mortgage being unpaid, he took possession of the property and placed the same in the hands of a custodian until the time of sale; and for ten days previous to the sale, he had posted five advertisements of the sale in the most public places in the vicinity of Talmon Hanford, in the town of Manteno, in Kankakee county, that the property would be sold to the highest bidder, at the residence of Talmon Hanford, in that town, on the 24th day of April, 1864, at ten o'clock in the morning, for cash, at public or private sale, and that at such time and place, he sold the property to the plaintiff, at private sale, for five hundred and forty dollars.

This was all the evidence in chief on the part of the plaintiff. He gave some rebutting testimony of no importance.

The defendant moved to exclude the mortgage and bill of sale—the mortgage, because there was no evidence of a sale of the property under the mortgage—the bill of sale, because it had no revenue stamp, and because it was not evidence of a sale, and because it was not accompanied by evidence that the conditions of sale, as provided in the mortgage, had been complied with.

The motion was denied and exception taken.

The objection to the mortgage was not tenable on the reason given. The mortgage may be valid, and yet the proceedings under it be irregular and invalid. These do not affect the validity of the mortgage.

The objection to the bill of sale for the reason of the absence of a revenue stamp upon it, is without foundation, as this court decided in the case of *Craig* v. *Dimock*, 47 Ill. 308. The other objection, that the bill of sale was not evidence of a sale, it being unaccompanied by evidence that the conditions for a sale, as provided in the mortgage, had been complied with, can not avail, as it was admitted in evidence without any objection. The objection comes too late. It has been the practice, in some courts, to exclude evidence from the jury which has been admitted without objection, but we are not inclined to favor it. The true practice is, when evidence thought to be improper is offered, to object to it, stating the objections, and if not sustained, then to except to the opinion of the court admitting it.

It was proved on the part of the defendant, by his own testimony, that he had no interest in the case; was sheriff merely, with an execution against Talmon Hanford, from the circuit court of Kankakee county, dated April 21, 1864, reciting, that it issued on a judgment rendered by that court at January term, 1862, and a levy endorsed June 8, 1864. The property was in Talmon Hanford's possession at the time of the levy. He further stated, against the objection of the plaintiff, that this bill of sale was not produced in evidence on the former trial.

The absence of plaintiff was proved by a witness, who stated he went away the fall before the trial. Witness knew of the chattel mortgage sale; it was a public sale; the notices of the sale put it on Sunday; to be at old Mr. Hanford's house; was furniture; does not know that the sale took place on Sunday.

The jury found the defendant not guilty, and that he had a special property in the goods and chattels in question.

A new trial having been refused, judgment was rendered on the verdict, to reverse which, the record is brought here by appeal.

The first point made by appellant, is in allowing the bill of sale to be attacked and discredited, by asking the sheriff the question, and allowing him to answer, that the bill of sale was not introduced as evidence on the former trial.

Whether this had the effect to discredit the bill of sale or not, is immaterial. The question itself was proper, as being part of the transaction and the foundation of plaintiff's claim. It was proper for the defendant to place plaintiff in the situation of explaining why he did not introduce the bill of sale on the former trial, or suffer the effect of such failure.

The next point is, that the first, second, fourth and fifth instructions on behalf of the defendant, should not have been given.

The first instruction contains a correct legal principle everywhere recognized, that a sale of personal property, to be binding on creditors and subsequent purchasers, must be entered into in good faith and for a valuable consideration, and not with intent to hinder or delay creditors.

The second instruction was wrong, as there was no evidence the sale under the mortgage was made on Sunday. The witness, Hazlitt, stated it was advertised for that day, but did not know that it was made on Sunday. No witness stated it was made on Sunday. The fourth instruction was wrong, there being no evidence that Stephen Hanford, the mortgagee, suffered the property to remain in the hands of the mortgagor after the time of limitation by the deed had expired. The proof is, that Talmon F. Hanford, who had purchased it under the mortgage, had so suffered it to remain in his father's possession. The bill of sale recites, that Stephen, the mortgagee, had taken it out of his possession before the 14th of April, 1864, and placed it in the care of a custodian and then sold it to plaintiff.

The fifth instruction was proper. Much of the case depended upon the fact of possession by the mortgagor after default. If he had not reduced the property to possession, the retention

of it by the mortgagor, after the day, was fraudulent *per se*, if such possession was retained by and through the act of the mortgagee.

But the proof, by the bill of sale, shows, that Talmon F. purchased the property, after default of the mortgagor, and he, and not Stephen, left it with his father. If this was a *bona fide* transaction, then the possession by old Mr. Hanford would be lawful and not fraudulent, as the case is presented.

It is also objected, that the third of defendant's instructions was wrong. It was, we think, calculated to mislead the jury, by saying to them, if the bill of sale had no stamp on it, it was a circumstance from which fraud might be inferred. We have said such instruments need not be stamped, to be evidence in our courts, and no inference unfavorable to a party, can be drawn by reason of the want of a stamp.

An objection is also taken to the sixth instruction, and we think well taken.

The sixth instruction tells the jury the form of their verdict will be, if they find for the plaintiff, "We, the jury, find the defendant guilty, and the right of property replevied to be in the plaintiff." If they find for the defendant, their verdict will be, "We, the jury, find the defendant not guilty, and the right of special property to be in the defendant."

Technically, a verdict of not guilty, is not a response to the plea of *non cepit* in an action of replevin, but has been allowed by this court. *Bourk* v. *Riggs*, 38 Ill. 320.

The plea of *non cepit*, by itself, admits the property to be in the plaintiff, and puts in issue the taking only; therefore, it does not follow, if the plea be found for the defendant, that a special property in him, is the consequence. The issue, under the plea of *non cepit*, should be, really, for the plaintiff, for the defendant admitted he took it under the execution, but justified, on the allegation it was the property of Talmon Hanford, the defendant in the execution. The verdict should have been, We find the issue for the defendant; that the

property was the property of Talmon Hanford, the defendant in the execution.

For the reasons given, the judgment is reversed and the cause remanded.

We say nothing upon the point that the sale was made on Sunday, as there is no proof of that fact.

Judgment reversed.

FRANCIS H. LALOR

v.

JOHN SCANLON.

NEW TRIAL—*verdict against the evidence.* Where the verdict is not clearly against the weight of evidence, the judgment will not be disturbed.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

This was an action of forcible entry and detainer, brought by Scanlon against Lalor, to recover possession of a dwelling house, on default of payment of rent. Scanlon claimed that the rental was payable monthly, in advance. Lalor claimed that the lease was for an unexpired term, and therefore not yet due and payable. There were a verdict and judgment for the plaintiff, and the defendant brings the record to this court and asks that the judgment be reversed, on the ground that the verdict was against the weight of evidence.

Mr. JOHN MASON and Mr. DANIEL SCULLY, for the appellant.

Mr. M. W. FULLER, for the appellee.

Syllabus.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of forcible entry and detainer, in which the plaintiff below obtained a verdict and judgment. It is insisted by the appellant that the evidence did not show a letting from month to month, or that any rent was due and unpaid. Both parties were sworn, and their evidence on these points was in direct conflict. The case was submitted to a jury on instructions. No exceptions were taken to those given for the plaintiff, and none asked by the defendant were refused. The precise points at issue were clearly left to the jury, and there is nothing in this record upon which we can set aside the verdict. It cannot be said that it is clearly against the evidence.

Judgment affirmed.

SETH W. HARDIN *et al.*

v.

JAMES KIRK.

1. PRACTICE AT LAW—*in actions of ejectment—where two separate actions were brought by different plaintiffs for the same land—concerning consolidation of the same.* H and W brought two separate actions in ejectment, against the same defendant, at the same term of court, for the same land, and by different attorneys; but both cases were docketed as one suit; the plea was so entitled and filed, and the docket entries showed that it was so treated by the parties. Upon the trial, after hearing the evidence, on motion of the defendant, the court required the plaintiffs to elect upon which declaration they would proceed, whereupon they elected to proceed in favor of H, and a judgment was rendered in favor of the defendant. *Held*, that W having failed to establish a right to recover, the action of the court requiring such election, was not error, it operating merely, as though the court had rendered a judgment against him, which could have been properly done.

2. But had W shown a right of recovery, such action of the court would have been error. Both cases having been treated as one suit, and the proofs heard, the defendant's objection came too late.

3. EJECTMENT—*consolidation of suits in—construction of the ninth section of ejectment act.* Under the ninth section of the ejectment act, parties may sue jointly, and proceed jointly in one count for the land, and each separately in other counts, and either for the whole, a part, or for separate and undivided interests, but parties cannot bring separate actions, as in this case, and be required to consolidate them, without their consent.

4. ACKNOWLEDGMENT OF DEEDS—*when certificate fails to show in what State it was made—deed insufficient.* Where the venue to the certificate of acknowledgment was simply "county of New York," and nothing appeared in the body of the deed, indicating in what State the ackowledgment was taken: *Held*, that this was insufficient, and rendered the deed inadmissible in evidence as showing title to the grantee therein, in an action of ejectment for the premises.

5. SAME—*must show where made and certified.* It must appear from the acknowledgment where it was made and certified; or by taking the acknowledgment and deed together we must be able to presume in what State it was taken; otherwise, it is defective.

6. EJECTMENT—*extent of recovery must conform to the declaration.* This court has repeatedly held, that under a declaration in ejectment for the entire premises an undivided interest less than the whole cannot be recovered.

7. EVIDENCE—*in ejectment—deed conveying a less interest—where the whole is claimed—inadmissible.* And in such case, where the whole premises are claimed by the plaintiff, a deed conveying a less interest is inadmissible.

8. STATUTES—*construction of ejectment act—seventh—not repugnant to the twenty-fourth section.* The twenty-fourth section of the ejectment act, does not apply in cases where the whole premises are claimed, and is not repugnant to the seventh section of that law.

APPEAL from the Circuit Court of Will county; the Hon. SIDNEY W. HARRIS, Judge presiding.

The opinion states the case.

Mr. E. S. HOLBROOK, for the appellants.

Messrs SCAMMON, MCCAGG & FULLER, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of ejectment, brought in the Will Circuit Court, to the January term, 1866. In form, there are two declarations, each for the entire tract of land, one by Hardin, and is signed by Holbrook, his attorney; the other by Wakeman, and signed by E. A. Coventry, his attorney. They are each separately entitled of the term, and in other respects formal declarations with the commencement, body, and conclusion of a declaration in ejectment containing one count and signed by separate attorneys. Neither refers to the other, nor is there any reference in either to the plaintiffs in the other. They are in all respects, declarations in ejectment by different plaintiffs, for the same land, in different suits. The commencement of each is by but one plaintiff. One notice and copy seems to have been served, but whether as one, or separately, does not appear from the record.

The docket was entitled as of both plaintiffs against the defendant, and as one case, and the rule to plead was so entered. The plea was entitled in the same manner. After hearing the evidence, the court who tried the case, by consent without a jury, on the motion of defendant, required plaintiffs to elect upon which declaration they would proceed, when they elected to proceed for a recovery in favor of Hardin. Exception to the decision of the court requiring an election was taken and preserved, and is now relied upon for a reversal. The court below also excluded a deed in the chain of title for the land, and found for the defendant and rendered judgment in his favor, which is complained of as error.

The ninth section of the ejectment law, declares that "In any case, other than where the action shall be brought for the recovery of dower, the declaration may contain several counts, and several parties may be named as plaintiffs jointly in one count, and separately in others." Under this section, Hardin and Wakeman, had they desired, could have sued jointly, and proceeded jointly in any count for the land, and each of them separately in other counts, and either for the whole, a part, or

for separate and undivided interests. But it does not provide that separate suits may be brought and afterwards united without the consent of the parties. The court, in the exercise of its discretion, might, no doubt, have permitted such a consolidation, and we might infer from the fact that the parties treated it as but one suit by the docket entry, the service, the rule to plead, and by the pleas, that it was so regarded by the court and the parties.

The question then presents itself, whether the action of the court in requiring the plaintiffs to elect, for which plaintiff they would proceed was error. Had Wakeman shown a right of recovery, it would have been error, as the defendant's objection came too late. He should have pleaded separately, and had the cases separately docketed, and not have waited until the plaintiffs had adduced all of their evidence. By going to trial and treating it as one case, defendant waived the right to object. But it appears that Egan entered the land in May, 1836; still Egan's deed to Wakeman, although executed in July, 1836, was never recorded in Will county. It was recorded in Cook county soon after its execution, and a certified copy from the records of Cook county was spread upon the records of Will county, on the 22d of August, 1861.

It appears the land in controversy was sold on an execution against Egan, and in favor of Hastings, from the municipal court of Chicago, and a sale to James Grant. It also appears that the land was redeemed from this sale on an execution in favor of Nathaniel P. Bailey and Henry W. Reynolds, and against Egan, on the twenty-fifth of December, 1838, and that they became the purchasers of the land under their execution, from which it was not redeemed, and for which they received a sheriff's deed, which was recorded in Will county on the 16th of January, 1841. Thus it is seen that this sale having been made and the sheriff's deed having been recorded before the deed from Egan to Wakeman, the sheriff's deed acquired priority, and extinguished Wakeman's title. Wakeman then

having failed to establish a right to recover, the dismissal or abandonment of the count in his favor, could not have prejudiced his rights. It only operates as though the court had rendered judgment against him at that state of the proceeding, which could have been done.

We now come to consider the principal question presented by the record. Was there error in excluding the deed of Bailey and Reynolds to Brown and Wyncoop? The certificate of acknowledgment by Bailey and wife, fails to show in what State the acknowledgment was made. The venue to the certificate is, "County of New York." This venue may apply equally well to a county of the same name in any state of the Union. The deed recites that he had formerly been in business in the city of New York, but it fails to state that he was then in the State and county of New York. There is nothing in the body of the deed, from which it can be inferred that the acknowledgment was taken in the State of New York. It must appear from the acknowledgment where it was made and certified, or by taking the acknowledgment and deed together, we must be able to presume in what State it was taken. The officer taking it can only act within the territorial limits of his jurisdiction, and it must appear that the act was performed within those limits. In this case the certificate and deed failed to show where the officer acted at the time when he took this acknowledgment, and is defective, and the deed as to his interest in the land was therefore inadmissible.

The acknowledgment of the deed by Reynolds, appears on its face to have been acknowledged in the State, county and city of New York, and from the statutes of New York read in evidence, the acknowledgment appears to be sufficient to authorize the deed to be read in evidence, to show that he thereby conveyed his title to the land. It was not, however admissible, for the reason, that the declaration claimed the whole of the land, and he only conveyed an undivided interest in the land. The seventh section of the ejectment act declares

that, "If such plaintiff claims any undivided share or interest in any premises, he shall state the same particularly in such declaration." The share conveyed by Reynolds, and which appellant claims to hold, is not particularly stated in the declaration. It contains no such count, and without it, this court has repeatedly held that an undivided interest cannot be recovered. This being the case, the deed was properly excluded. The twenty-fourth section of the ejectment law does not apply, under the pleadings in this case. The 6th clause of that section only applies where the declaration proceeds for a particular undivided interest, and not where it claims the entire interest. This is manifest by a reference to the seventh section. The clause in the latter section is not repugnant to the first named section, and hence that part of the seventh is not repealed. They are consistent and may stand together. We perceive no error in this record and the judgment must be affirmed.

Judgment affirmed.

JOHN COMSTOCK *et al.*

v.

CHARLES K. PURPLE *et al.*

1. PARTIES—*in suits in partition—application by the purchaser of lands under decree in suit for partition—to be made a party to subsequent proceedings had to set aside the sale.* Where, in a suit for partition of lands, a decree for partition was rendered and a sale made by the master, and subsequently, proceedings were instituted to set aside the sale, and an order to that effect granted, and this, without any notice thereof to the purchaser at the sale; and such purchaser, thereafter, and after an appeal had been taken from such order, but not perfected, by one of the parties to the record, made application to be made a party defendant to the proceedings, which the court granted, but decreeing, also, that the

decree setting aside the sale should be binding upon him, the same as if he had formerly been made a party thereto, and leave was granted him to appeal therefrom: *Held*, that the proceedings allowing such purchaser to be made a party defendant, at that stage of the cause, although irregular, were nevertheless proper and just, in order that he might suffer no injury from proceedings of which he had had no notice, and against which he had no opportunity to defend.

2. APPEALS—*of separate appeals.* And in such case, the appeal taken by the purchaser was entirely independent of that taken by the other defendant, and the abandonment by the latter of his appeal, can not, in the least, affect the appeal taken by the former. They have no connection whatever.

3. NOTICE—*to the purchaser—on motion to set aside sale of lands in partition.* The purchaser at the sale of lands, made under a decree in partition, must have notice of the motion to set aside such sale.

4. JUDICIAL SALES—*inadequacy of price.* This court has repeatedly said, that where lands are sold for an inadequate price, that, of itself, is not sufficient cause to set aside the sale, unless it is so grossly inadequate as to establish fraud.

5. Where, on a sale of lands made by the master in chancery, under a decree in partition, the order of the court directing such sale, was in every particular faithfully complied with, and all the proceedings were conducted with the utmost fairness, such sale will not be disturbed, even though the lands were worth one hundred per cent. more than the sum actually bid for them, and for which they were sold.

6. At judicial sales, property is not expected to sell for its full value, and mere inadequacy of price will not justify the court in setting aside the sale, the order of the court directing such sale having been faithfully observed, and no fraud being shown.

7. FORMER DECISIONS. The cases of *Ayres* v. *Baumgarten*, 15 Ill. 444; *Garret* v. *Moss et al.*, 20 ib. 549; *Coffey* v. *Coffey*, 16 ib. 141; *Jackson* v. *Warren*, 32 ib. 331; *Booker* v. *Anderson et ux.* 35 ib. 66, and *Soward* v. *Pritchett*, 37 ib. 517, cited and considered.

8. JUDICIAL SALES—*manner of conducting them—rights of bidders.* The practice is, in sales made by a master in chancery, if the decree of the court does not otherwise direct, to strike the property off to the highest bidder, and it has not been usual to report bids to the court. And where the purchaser complies with all the terms of the sale, it is not usual for the court to refuse to confirm it, unless fraud, accident, mistake, or some great irregularity, calculated to do injury, has occurred.

9. FORMER DECISION. The case of *Dills* v. *Jasper*, 33 Ill. 262, is not considered in harmony with previous decisions of this court, or the practice in this State.

10. PRACTICE—*receiving additional proofs from one party, after submission of cause—without the knowledge of the opposite party.* After a cause has been fully argued and submitted to the court for its decision, it is error for the court to receive additional evidence from either party, without the knowledge of the other.

APPEAL from the Circuit Court of Peoria county; the Hon. SABIN D. PUTERBAUGH, Judge, presiding.

The opinion fully states the case.

Messrs. WEAD & JACK, for the appellants.

Messrs. MCCOY & STEVENS, for the appellees.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

Appellees make the point, that John Comstock had no right to appeal; that he is not entitled to a hearing upon this record, and that the appeal should be dismissed. To understand this position, a brief history of the case is necessary.

A portion of the heirs at law of the late Norman H. Purple filed their petition in the circuit court of Peoria county, against the other heirs at law of the same, and Ezra G. Sanger and Nathaniel B. Curtis, his guardian, for the partition of a certain tract of land in Peoria county, the petitioners claiming that they, with two of the defendants, were, equitably, the owners in fee simple, as tenants in common, of the undivided one-half of the premises, and Ezra G. Sanger was the equitable owner of the other half. Three of the defendants, namely: E. G. Sanger, Frank E. and Jessie A. Purple, were alleged to be minors, and the prayer was for a partition of the premises.

A summons was issued, and returned served on all the parties, by delivering to each of them a true copy.

A default was taken against Ann E. Purple and N. B. Curtis, and on the same day a guardian *ad litem* was appointed for the infant defendants, who filed his answer, calling for proof of the allegations in the petition.

An order of reference to the master was had, who, in due time, reported, finding title and heirship as alleged.

A decree for partition was duly entered, reciting the facts as to ownership and interests, and commissioners were appointed to set off and allot the premises among the several parties, according to their several interests as found by the decree.

The commissioners reported, that they went upon and examined the premises, and in their judgment they could not be divided without great injury and prejudice to the interests of the proprietors, and recommended a sale of the same, and the court passed a decree of sale by the master in chancery, after a notice of twenty days, by publication in some newspaper published in the city of Peoria, at public auction, the purchaser to pay one-third of the purchase money in cash, at the time of sale, and the balance in equal payments in six and twelve months, with six per cent. interest on the deferred payments, to be secured by a deed of trust on the premises; with the privilege to the purchasers of paying cash in hand, the full amount of the purchase money; and the master was required, after paying the costs of the proceeding, to distribute the balance of the funds in his hands among the parties as specified in the decree.

The master, in due time, reported the sale in strict accordance with the decree, and after giving notice, not only by publication in a public city newspaper, but by posting up copies of it in twenty of the most public places in the county, for more than three weeks prior to the sale, and which contained a full description of the land to be sold, the names of the parties, style of the court and term of the court at which the decree was rendered, and the time, place and terms of sale, as set out in the decree; that he attended at the time and place

mentioned in the notice and offered the premises for sale, and that John Comstock bid therefor the sum of fifteen dollars per acre, and which being the highest and best bid offered, the land was struck off to him at that price; that Comstock paid to him, cash in hand, the full amount of the purchase money, amounting to eleven hundred and twenty-five dollars, and that he thereupon executed, acknowledged and delivered to Comstock a good and sufficient conveyance of the same. The master further reports in what manner he disposed of the money, by which it seems, after paying the costs, there remained in his hands a balance of nine hundred and twenty-two dollars and twenty-two cents. This, he reports, he distributed as follows: one-half of said money, viz: $461.46, he tendered to N. B. Curtis, guardian of Ezra G. Sanger, but which he refused to receive, and the other half, being the like sum, he paid to Jacob Darst, he being the owner of the distributive shares, and entitled to the share of Jessie A. Purple, by an order attached to the report in *Purple* v. *Purple et al.*, No. ——, and also entitled to the share of Frank Purple, by reason of his being such guardian, all which was in accordance with the decree.

The master's report was filed July 10, 1867. The sale was on the 26th December, 1866. Whereupon, N. B. Curtis entered his motion, based upon his affidavit, to set aside this sale.

The affidavit states, that he is the guardian of E. G. Sanger, and that, by virtue of the decree of the court, the master sold the land to Comstock for fifteen dollars per acre, while the fact was, the land was worth fifty dollars per acre; that it adjoins the town of Princeville, and was very desirable and valuable, and had valuable timber growing upon it, and has no doubt, if properly advertised, it would have brought fifty dollars per acre, and says, if it is again exposed to sale, he will give, for the seventy-five acres, two thousand dollars; alleges the land was sold for a greatly inadequate price—for

not more than one-fourth of its value,—and gives a reason why he was not present at the sale—that Darst, who had purchased the interest of the Purple heirs, and thereby equally interested with affiant's ward, told him, in a conversation on the subject, that he knew a man who was willing to give all the property was worth, and that it would not be necessary for affiant to remain; that at that time Darst conceded the land was worth fifty dollars per acre.

Counter affidavits were filed by Comstock and others putting a value on the land of about twenty dollars per acre. Comstock, in his affidavit, states, that in a few weeks after receiving the master's deed, he sold the premises to one Buck, and he, soon after, sold them to Jacob Fast; that Fast took possession and has made considerable improvements and fenced the premises; insists the sale should not be set aside unless the money he advanced be first refunded and the improvements made by Fast paid for, and that they should be notified of these proceedings; says he knows the sale was largely advertised, and was well attended by persons residing in the vicinity of the land, who bid on it; that, at the same hour and place, other lands were sold by the master, which had the effect of bringing many persons together at that time, and that all the lands brought fair prices; that this particular tract brought all it was worth, considering the title to it, which he believed defective, showing wherein; that the tract does not adjoin the town of Princeville, and is not well timbered, but is rough and broken, and not worth fifty dollars an acre, or anything like it; that he never before saw a sale so well attended by parties able to purchase, and who bid so freely as at this sale.

Among other affidavits was that of Jacob Darst, who says he knows the sale was well and thoroughly advertised; that many persons, from the vicinity of the land, attended the sale and bid for the lands offered; that no one considered the tract in question worth more than twenty dollars an acre with a perfect title, and would not bring that much on speculation;

was interested in having the lands bring the highest possible price, and is satisfied they brought a fair price under the circumstances; that before the sale, he had purchased the interests in it of the adult heirs, and was guardian for the minor heirs, and one-half the proceeds came to him, and is satisfied with the sale; that the land does not adjoin Princeville, and is not covered with good timber, and is worth only about twenty dollars per acre with a good title, &c.; denies that he stated to Curtis that he knew a man who would bid forty dollars per acre for the land, but told him he thought he knew a man who would bid that sum for a part of it, but he afterwards understood that the person had not the money and did not wish to purchase; says he exerted himself to obtain a good price for the land, both before and at the sale.

The master in chancery also made an affidavit, showing abundant notice—more extensive than the decree required, was given of the sale; that the sale was fairly made and was kept open more than three hours; that at least forty persons were present, twenty of whom were bidders, and most of them men of wealth, and the bidding was spirited and lively, &c.; that a number of persons from Princeville told him that portions of the tract were worthless, and other portions quite valuable, and that twenty dollars per acre was a fair price, taking the whole tract, &c. This was the substance of the evidence before the court.

On the 10th of August, Curtis brought into court the sum of two thousand dollars, as a first bid for the premises, should a re-sale be ordered.

On the 16th of September, 1867, a decree passed, setting aside the sale, reciting therein the affidavits in support of and against the motion, and that "N. B. Curtis, guardian, &c., having deposited in court the sum of two thousand dollars as a first and standing bid on the premises sold, in case a new sale is ordered, and the court, having heard arguments of

counsel, doth find that said real estate was sold at a grossly inadequate price."

There were conditions in the decree setting aside the sale, one of which was, that the parties to this proceeding should advance to the master a sufficient sum of money to pay all the costs and expenses of the sale, and interest on the purchase money from the date of its payment, at the rate of ten per cent. per annum; and to John Comstock all his costs and expenses attending the purchase, including fifty dollars to apply on his attorney's fees in resisting the motion; the master to compute the expenses and notify the parties, &c. On compliance with the conditions, the master was required to expose again the premises to sale; if not complied with within the time specified, the report of the master was to be confirmed.

On the 9th of November, the master filed his report, stating therein, that he proceeded to execute this order, and that Comstock refused to receive the money, informing the master that he intended to appeal to the supreme court from the order, and that he, the master, had notified Curtis of such Comstock's intention. On the same day, Darst prayed an appeal, which was allowed, and on the 16th of November an appeal was prayed by Charles K. and William M. Purple, and allowed. An appeal bond was duly executed by Jacob Darst, as guardian, &c.

On the last mentioned day, Comstock presented his petition praying to be made a defendant in the proceedings, and to show cause why the last decree should be set aside and the master's first report confirmed. On the 17th of February, 1868, the court entered an order as prayed, and it was further ordered and decreed, that the decree theretofore made setting aside the sale, should operate and be binding upon Comstock the same as if he had been formally made a party thereto before the decree, and leave was given him to appeal from the decree, by filing bond, &c.

Appellees take this ground, that inasmuch as an appeal was allowed to Darst, who perfected it by executing a bond, and he having failed to bring any record here, and having failed to appear in this court, must be presumed to have abandoned his appeal, both on his own account and of any other person, therefore, they contend, his appeal should be dismissed.

To this, we presume, the present appellant could make no objection, as Darst's appeal is entirely independent of his. They have no connection with each other of any kind.

But appellees contend, that, so soon as Darst perfected his appeal, the case was no longer pending in the Peoria Circuit Court, but, in contemplation of law, was pending in this court, and, consequently, no power existed in the circuit court to make Comstock a party defendant, giving him the right to appeal from the order setting aside the sale.

Admitting Comstock to come in and defend was, doubtless, irregular, but it was in furtherance of justice, the case being still in the Peoria Circuit Court, notwithstanding Darst's appeal, for Comstock had presented his petition to be made a defendant, on the 16th of November, and Darst did not execute his bond on his appeal until the 3d day of December following. Comstock's petition was not granted until the February following, and then on terms which would have compelled him to abide by the order setting the sale aside. The case was pending in the circuit court when the application was made, and before the record was taken to this court; it was granted, and Comstock became a party defendant, and as such could, on his own behalf, take and prosecute his own appeal, independent of Darst or any other party to the proceedings. It was highly proper and just he should be a party to proceedings the effect of which was to deprive him of property for which he had, in good faith, paid his money and received a deed, and of which proceedings he had no notice until they were on the point of consummation. He was entitled to notice of the application to set aside the sale, and his

application to be made a party was in the nature of a bill of interpleader, and no act by Darst, or of any other party, could deprive him of the benefit of it. If it was irregular to make him a party at that particular stage of the case, it was of such a character as, while doing no injury to any one, tended to further justice, and to prevent a great injury which would have ensued to Comstock, which, having no notice, he had no opportunity to defend against and prevent. On the motion to set aside the sale, it was indispensable that Comstock, the purchaser at the sale, should have notice of the motion. *Dunning* v. *Dunning*, 37 Ill. 306.

Having become a party, we have considered the case on its merits, and find no ground, on the proofs before the court, to set aside the sale. Admitting the land sold for an inadequate price, the doctrine of this court is, that, of itself, is not sufficient, unless it should be so grossly inadequate as to establish fraud. Here, the order of court, as to the notice of the sale, was more than fully complied with, extra notices having been given in twenty of the most public places in the county; the sale attended by a large number, many of whom were men of wealth, and all the proceedings conducted with the utmost fairness, and though the land might possibly be worth one hundred per cent. more than the sum actually bid for it, and for which it was sold, that was not sufficient to justify the court in setting the sale aside. If it were so, then but few, if any, judicial sales could be of the least validity. While courts of justice will watch over these sales with a jealous eye, with a view to the discovery of fraud, or of such gross irregularities as shall amount thereto, they will not, and ought not, when the order of the court has been faithfully observed, in the absence of fraud, disturb such sale. In this case, a deed was actually made to the purchaser, the whole of the purchase money having been paid, and it was sought to take the bargain from him, by proceedings in court, instituted and carried on to a final order, without any notice to him. Such injustice

is beyond comment. He had a right to the benefit of his purchase, though at a low price, for the whole public could have competed with him, and if there was a bargain in the land, he was not the only one who could have secured it. Where a judicial sale is made at a price below the supposed actual value of the property, if it proves to be a good purchase, it is not difficult to find persons who will swear that the price was grossly inadequate, for such swearing is not at all hazardous, as it is mere opinion, for entertaining and expressing which, though false and unfounded, no indictment would lie. Where a judicial sale has been fairly and impartially conducted, in the presence of numbers, and the bidding is spirited and lively, as in this case, something more than mere inadequacy of price should be shown to justify a court in setting aside the sale. Property does not fetch, and is not expected to fetch, at such sales, its full value. The creditor, as a general thing, has a right to his money, if it be in a case where money is adjudged, and the debtor's property must be put up for sale, and a sale forced to bring the money. Price depends upon many circumstances, to which the debtor must expect to become the victim, and the creditors may honestly hope to gain. The law allows it, and this court has awarded it in more than one case.

In *Ayres* v. *Baumgarten*, 15 Ill. 444, citing *Livingston* v. *Byrne*, 11 Johns. 556; *Tripp* v. *Cook*, 26 Wend. 143; *Williamson* v. *Dale*, 3 Johns. Ch. 290, it was held as a general principle, that mere inadequacy of price is not a sufficient cause for setting aside a sale. This was a sale by a guardian.

In *Cooper* v. *Curly*, 3 Gilm. 506, which was a sale of mortgaged premises, by a master in chancery, the court said, the English rule of opening biddings on a master's sale, which was almost a matter of course, upon the offer of a reasonable advance on the amount bid, if the motion was made before the confirmation of the report, has not obtained in this country. The rule here seems to be, if it be shown there has been

any injurious mistake, misrepresentation or fraud, the biddings will be opened, the reported sale rejected, or the order of ratification rescinded, and the property again put into the market and re-sold.

In *Garret* v. *Moss et al.*, 20 Ill. 549, it was held, in order to set aside a sale because of inadequacy of price, a case of sacrifice must be shown, and where the evidence was conflicting, ranging, as to value, from twenty to one hundred and twenty-five dollars an acre, and the land was sold at fourteen dollars and fifty-nine cents an acre, this court refused to disturb the sale, not being prepared to hold, in view of the evidence, there was such a sacrifice as would justify the reversal of the decree.

In *Coffey* v. *Coffey*, 16 ib. 141, the court held, the conduct of the successful bidder at the sale, setting up a claim to the land, and threatening to litigate it with any purchaser, was such unfairness and fraud in the sale as to warrant a decree setting the sale aside.

In *Jackson* v. *Warren*, 32 ib. 331, which was an action of forcible entry and detainer, under the act of 1861, providing this remedy, where lands have been sold under a judgment or decree, against the party wilfully withholding the possession, the court remarked on the English practice of keeping the biddings open at a master's sale, in order that there may be advances on a bid received by the master, which he reports to the court, by which no one can be a purchaser, but a mere bidder, until a final confirmation of the sale by the chancellor, and said this practice did not obtain in this State; that a valid and binding contract was made when the hammer fell. In the absence of fraud, mistake, or some illegal practices, the purchaser is entitled to a deed on the payment of the money.

In the case before us, the decree of the court specially authorized the master to make a deed on the payment of the cash in hand.

In *Booker* v. *Anderson and wife*, 35 ib. 66, at page 87, the court explains what was meant by a sacrifice as held in *Garret* v. *Moss*, *supra*, that such sacrifice must amount to a fraud.

In *Soward* v. *Pritchett*, 37 ib. 517, it was held, that where two-thirds of the value had been bid for the land, such inadequacy of price would not, alone, be ground to set aside the sale, yet it would have its weight, when considered with other evidence, in preventing an approval of the master's report of the sale. The case was decided, chiefly, upon the insufficiency of the notice. In this case the court said, although it is the duty of the chancellor to protect a purchaser at a master's or commissioner's sale, it is equally his duty to prevent a sacrifice of the property by fraud, accident or negligence of the officer in conducting the sale. It is a cherished object of courts to give stability to judicial sales, and, at the same time, so far as possible, protect and guard the rights of the owners.

We have been referred, by appellees, to the case of *Dills* v. *Jasper*, 33 ib. 262, which is not considered in harmony with previous decisions of this court or with the practice in this State. The practice is, if the decree of the court does not otherwise direct, to strike the property off to the highest bidder, and it has not been usual to report bids to the court. If the bidder complies with all the terms of the sale, it is not usual for the court to refuse to confirm the sale, unless fraud, accident, mistake, or some great irregularity, calculated to do injury, has occurred.

In the case now before us, the most scrupulous regard has been shown to the order of the court; all the notice required by the decree, and more, was given; bidders attended in great numbers; the land was sold to the highest bidder, for a sum near its proved value; the money was paid and a deed executed to the purchaser, who has sold and conveyed the land to others, not parties to these proceedings, and we cannot perceive the slightest ground for refusing a confirmation of the

master's report, or for setting aside the sale, and the decree setting it aside must be reversed.

We have not considered the affidavits presented to the judge at chambers, after the motion had been argued and submitted, not deeming them evidence. The cause had been fully argued and submitted; the opposite counsel had no notice of these affidavits, and the judge was required to decide the cause on the evidence then properly before him. To receive evidence afterwards, without the knowledge of the opposite party, is contrary to the uniform practice, unjust in itself, and highly improper.

Decree reversed.

THE STATE SAVINGS INSTITUTION

v.

JOHN A. NELSON.

JUDGMENT—*power of the court after the term.* The power of the court over its judgments, except to amend them in matters of form, or to correct clerical errors, is gone when the term at which they were rendered has expired. After that time, a court cannot, on motion, set aside a judgment.

APPEAL from the Recorder's Court of Chicago; the Hon. EVERT VAN BUREN, Judge presiding.

On the 3d day of October, 1865, the State Savings Institution recovered a judgment in the court below, against John A. Nelson, the then sheriff of Cook county, for the sum of $1,500, for failing to pay over money collected by him upon execution.

On the 10th of February, 1868, the court, on motion of Nelson, set aside that judgment. The record is brought to this court, and the order setting aside the judgment is assigned as error.

Mr. A. C. STORY, for the appellant.

Messrs. GOODRICH, FARWELL & SMITH, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The judgment in this case was set aside on motion, more than two years after its rendition. The court had no power to do this. Its power over the judgment, except to amend it in matters of form, or to correct clerical errors, was gone when the term at which it was rendered expired. *Cook* v. *Wood*, 24 Ill. 296. The appellee, if entitled to relief, must seek it in a court of chancery.

The order setting aside the judgment is reversed.

Judgment reversed.

THE CITY OF CHICAGO

v.

MATTHEW LAFLIN *et al.*

1. RIPARIAN PROPRIETOR—*his title—how far it extends—and rights of defined.* Where certain lots bordering on the Chicago River, were granted to a party by the government, and no reservation was made in such grant, whereby the grantee was confined to the water's edge, in such case the title of the owner extends to the thread or central line of the stream, and he has the right to erect and maintain wharfs and docks on its bank, and use and enjoy it in every

legal manner, provided, he does not obstruct navigation, or impair the rights of others.

2. NUISANCE. And in such case, where the owners of such lots had erected docks thereon, and enjoyed the use of the same for a period of over twenty-five years, without complaint or interruption from any source, even if they were not riparian proprietors, and their boundaries did not extend beyond the water's edge; after such long acquiescence, the corporate authorities of the city cannot declare them a nuisance, which, if they are a nuisance, have become so by the act of the city.

3. SAME—*compensation required.* But even if the corporate authorities had the power to declare them a nuisance and require their removal, they having become a nuisance by the act of the city, before such exercise of power could be had, compensation to the owners must be made.

4. FORMER DECISIONS. The cases of *Middleton* v. *Pritchard*, 3 Scam. 570; *The People* v. *The City of St. Louis*, 5 Gilm. 351; *Canal Trustees* v. *Havens*, 11 Ill. 554, and *Ensminger* v. *The People*, 47 Ill. 384, cited and considered.

APPEAL from the Superior Court of Chicago.

The opinion states the case.

Mr. S. A. IRVIN, for the appellant.

Mr. A. W. ARRINGTON and Messrs. DENT & BLACK, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

Appellees were the owners of a wharf on the Chicago river, on lots owned by them, and were about to commence repairs on it in the spring of 1867, when the city filed a bill to restrain and prevent their making such repairs, and to have them declared a nuisance. Appellees filed an answer, denying the allegations of the bill; setting up that they were the owners of the lots in fee, in front of which they were building wharfs or docks which are the obstructions of which the city complains. That they paid more for the lots because they had wharfage

privileges; that the river was shoal water and they only placed the wharfs so far in the river as was necessary to enable vessels to approach them; that the wharfs were first built in 1840, and they have respectively a right to maintain them; that they were only in the act of repairing or rebuilding them when enjoined; that they had used them since 1840, and insist that there is a complete remedy at law, and set up the statute of limitations. On the hearing in the court below, a decree was rendered dissolving the injunction and dismissing the bill, and the case is brought to this court on appeal.

It appears that the Secretary of War laid out and platted the Fort Dearborn reservation for the United States, into an addition to the city of Chicago, on the seventh day of June, 1839. The plat was acknowledged and recorded. The lots were sold by the government and patents were issued to the purchasers, and appellees derive title from that sale, and by stipulation it is agreed that they are the owners of the lots upon which the wharfs are situated.

In the explanation of the plat, the Secretary of War says:

"The width of the rear of the water lots bounded on the Chicago river, is determined and established by posts set at the intersection of the lines of the lots and streets with meanders of the river, as shown by the notes entered upon the meandered lines."

It appears from the evidence that these wharves were erected as early as in 1840 and 1841, and have been used and maintained by the respective owners ever since. It also satisfactorily appears that these docks did not cause any obstruction to the navigation of the river until the city built the Rush street bridge, and dredged the river, since which time, the navigation has not at that point been as convenient as it was previously. These facts, then, present the question, whether appellees are riparian owners of these lots, and as such, had the right to

erect and maintain such wharfs, and the further question, whether the city by its own acts, in the erection of the bridge and dredging the river, rendered the wharfs which were previously innoxious, a nuisance.

In the case of *Middleton* v. *Pritchard*, 3 Scam. 570, this court held that the owner of land bounded by a stream not navigable in the technical sense of the term, held the land to the center of the thread of the stream, and that the water and soil under it, were exclusively that of the riparian owner to that point, and it was also held that the Mississippi river was not a navigable stream in a legal sense, and that this right was subject to the public easement of passing over the stream. That a grant to any individual bounded by such a stream, carried the ownership to its center current, by the rules of the common law.

In the case of *The People* v. *The City of St. Louis*, 5 Gilm. 351, it was held that the several States may, within their own jurisdiction, do whatever they please with this river, so as they do not infringe upon the rights of others, and leave a free and commodious passage. That the State might change the current of the Mississippi river, or even stop up some of its confessedly navigable channels, whenever they find it necessary to their own well being, the same as any other highway, taking care that they leave a free passage to those who have a right to navigate it, and if in doing so, private property should be damaged, compensation would have to be first made to the owner. And in the same case it was said that riparian owners have a right to make erections on their own land, which do not infringe upon a public easement, but have no right to erect a nuisance in a public highway.

Again in the case of *Canal Trustees* v. *Havens*, 11 Ill. 554, it was said that "By the common law, a grant of land bordering on a highway or river, carried the exclusive right and title in the highway or river to the center thereof, subject to the right of passage in the public, unless the terms of the grant

clearly indicated an intention on the part of the grantor to confine the grantee to the edge or margin. In such case, the highway or river is regarded as the boundary or monument, and the purchaser takes to the middle of the monument as a part and parcel of his grant."

In the case of *Ensminger* v. *The People*, 47 Ill. 384, it was held that riparian owners bordering on the Ohio river, have the right to erect and maintain wharves and docks on its banks, between high and low water mark, so they do not obstruct navigation or impair the rights of others. That on such streams the public have no right to land their cargoes on the land of the riparian owner without his consent; that such owner might charge a reasonable amount for dockage and wharfage.

From these decisions it will be observed, that the rule is well settled, that the title of a riparian owner extends to the middle thread of the stream if it is called for as a boundary, and if he is the owner, subject, it is true, to the public easement, and there is no imaginable reason why he may not use and enjoy it as his own in any legal manner, provided he does not obstruct or impair the enjoyment of the easement by the public.

In this case, the United States Government granted these lots, bounded by the Chicago river, and made no reservation. It therefore follows, that the grantees became the owners of the water and soil to the center or thread of the stream, subject to the easement the public had to navigate it, and they had the undoubted right to make these erections, if in so doing, they did not impair the easement of the public, and the evidence shows that they in nowise rendered it less commodious. Again, they had enjoyed the use of these wharves for over a quarter of a century, and so far as we can see, without complaint or interruption, and if they had been a nuisance, we may readily suppose, that those engaged in the vast commerce of the river at that point, fully alive to their interests and tenacious of their rights, would not have slumbered so long before endeavoring to enforce them.

Even if these owners were not riparian proprietors, and their boundaries did not extend beyond the water's edge, we do not see that the general government granted or dedicated the bed of the river to the city, and the general government has not complained of these erections, and after such long acquiescence, the city cannot now declare them a nuisance. And even if the State has delegated its rights to the city to change the channel of this stream, and we have been referred to no law which grants the power, it could exercise no higher or greater power than the State; and we have seen, that if the State exercises such power and it injures the rights of individuals, compensation must first be made. It would be monstrous that the city should at pleasure, make changes in this stream so as to render buildings on the wharfs an obstruction, and then require their removal without compensation. Such power would be more vast and absolute than can be exercised by the State itself. The city government is created, and has its powers delegated for the better protection of individual rights, and not that they may be disregarded or destroyed.

If this has became a nuisance, it was by the act of the city, and the appellees cannot be made responsible for their acts. In no point of view, in which we have been able to examine this case, do we see that the court below could have regarded these wharves as a nuisance created by the owners, and hence it would have been error to enjoin their reparation, or to have decreed their removal. For these reasons, the decree of the court below must be affirmed.

Decree affirmed.

Toledo, Peoria & Warsaw Railway Company

v.

Martin Arnold.

1. Cause of action—*where injury complained of occurred after suit brought—can be no recovery.* In an action on the case against a railway company, to recover damages for stock alleged to have been killed by the defendants' cars, the proof showed, that a part of the injury complained of, and for which the plaintiff recovered, was not sustained until after the commencement of the suit: *Held*, that as to the stock killed after suit brought, a recovery could not be had.

2. Evidence—*in an action against a railway company for stock killed—what will be considered sufficient proof that the injury was done by defendants' trains.* And in such case, where there is no positive proof that the defendants operated the railway, which it is claimed committed the injury, but such fact is inferentially shown by the fact, the defendant was incorporated by the name it bears, at a session of the legislature next previous to the injury complained of,—under such circumstances, the inference is, that such injury was done by the defendants' road, there being no proof that any other road was operated in that portion of the county where the damage was done.

Writ of Error to the Circuit Court of Tazewell county; the Hon. James Harriott, Judge, presiding.

This was an action of trespass on the case, brought by the defendant in error against the plaintiff in error, in the circuit court of Tazewell county, to recover damages for stock alleged to have been killed by defendant's railroad, by reason of its failure to fence its road. The cause was tried before the court and a jury, and judgment rendered in favor of plaintiff for $440, to reverse which, the record is brought to this court by writ of error.

Messrs. Ingersoll, Puterbaugh & McCune, for the plaintiff in error.

Messrs. Prettyman & Richmond, for the defendant in error.

Mr. Chief Justice Breese delivered the opinion of the Court:

The first point made by plaintiff in error is well taken. The record shows the suit was commenced August 16, 1865, and the proof is, that the heifer, worth $30, was killed in October thereafter, and the hog was killed in September, one month after the commencement of the suit, and of the value of $30.

The plaintiff recovered the value of these animals, which he had no right to do.

As to the mare worth $170, there is some discrepancy in the proof, and we leave that for the consideration of another jury.

Upon the other point, there seems to have been no positive proof that the plaintiff in error operated the railroad, but it is inferentially shown, by the fact that the plaintiffs were incorporated by the name they bear, at the session of the legislature next previous to the injury complained of, so that, it must have been their road that did the injury, if no other road was operated in that section of the county, of which there is no suggestion either way. The inference, under the circumstances, is a fair one, that it was the road of plaintiff in error.

For the reasons given, the judgment must be reversed and the cause remanded.

Judgment reversed.

THE PROVIDENT LIFE INSURANCE COMPANY OF CHICAGO

v.

MARY FENNELL.

1. INSURANCE—*against accidents.* In an action on a policy of insurance, against death by accidents, the court refused to permit the defendant to give in evidence the application of the assured, showing, that at the time of the insurance, his occupation was that of a "switchman," and to prove in connection therewith, that the assured was killed while in the performance of the duties of a "brakesman." *Held*, that this evidence was immaterial. That the mere representation by the assured, that he was a "switchman," did not amount to a contract that he would do no act not connected with such occupation, or that he would not engage in any different one.

2. SAME—*policy must provide for the cases in which protection from liability is sought.* In such case the defendant cannot protect itself from liability, inasmuch as the policy was not against accidents occurring in the occupation of the assured, but against accidents generally and enumerated the particular cases in which the company could not be held liable, but did not provide that it would not be liable for death occurring from a cause not connected with the occupation of the assured, or that he should not change his occupation.

3. SAME—*acknowledgment in policy of the receipt of the premium—cannot be controverted.* Where a policy of insurance, acknowledges the receipt of the premium, proof that it had not been paid, will not be permitted.

APPEAL from the Superior Court of Chicago.

The facts in this case sufficiently appear in the opinion.

Mr. GEORGE H. HARDING, for the appellant.

Mr. HERVEY, ANTHONY & GALT, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was a suit brought by Mary Fennell against the Provident Life Insurance Company, upon a policy issued upon the

life of her deceased husband. The plaintiff had a verdict and judgment and the defendant appealed.

It is now urged for appellant, that the court erred in not permitting the defendant to give in evidence the application of deceased for the insurance, showing that his occupation at the time of the insurance was that of a switchman on a railway, and to prove in connection with this evidence, that he was killed while performing the duties of a brakesman. The insurance was against death by accident. The evidence offered, if admitted, would have been immaterial. The representation was merely that the occupation of the deceased was then that of a switchman, the truth of which is not denied, and did not amount to a covenant that he would do no act not connected with such occupation, or that he would not engage in any different occupation. *N. E. M. & F. Ins. Co.* v. *Whitmore*, 32 Ill. 223 The policy was not against accidents occurring in the course of his occupation, but against accidents generally, and provided expressly in what particular cases the company was not to be liable, but did not provide that it would not be liable for death occurring from a cause not connected with the occupation of the assured, or that he should not change his occupation. If the company had desired to protect itself from all liability, except for accidents occurring in a particular occupation, it should have so expressly stipulated. That it did not understand its own policy as only covering so narrow a ground is evident from the fact, that it did expressly guard itself against liability for death or injury incurred through war, riot, or invasion, or while the assured was in a state of intoxication, or from riding races, dueling or fighting.

It is also objected, that the court did not permit the company to prove the premium had not been fully paid. The policy acknowledged the receipt of payment, and we have decided in a case not yet reported, that this statement of a policy could not be controverted.

Judgment affirmed.

ANTHONY A. C. ROGERS

v.

CHARLES GALLAGHER.

1. BILLS OF EXCHANGE—*discounted by acceptor before maturity—does not lose its negotiability—and if re-issued—endorsers are liable.* The principle is well settled, that a bill of exchange, discounted by the acceptor before maturity, does not lose its negotiability, and if re-issued by the acceptor, before it falls due, to a stranger who takes it in good faith, and for a valuable consideration, the parties whose names appear on the bill as endorsers, are liable to the holder, the same as if it had not passed through the hands of the acceptor.

2. SAME—*what considered a sufficient consideration for the transfer by the acceptor.* And in such case, where the party to whom the bill is re-issued, takes the same on account of indebtedness of the acceptor to him, such indebtedness constitutes a sufficient consideration to support the transfer.

APPEAL from the Superior Court of Chicago.

The opinion states the case.

Messrs. ROGERS & GARNETT, for the appellant.

Messrs. SCAMMON, MCCAGG & FULLER, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, against appellant, impleaded with Bradford, upon a bill of exchange, dated at Pine Bluffs, Arkansas, April 3d, 1861, drawn by F. Brower and directed to Stewart & James, New Orleans, Louisiana, whereby they were requested to pay to the order of Rogers & Bradford $783.60. It was endorsed by the payee, and sent by him to the drawees, to be received and applied upon indebtedness of Rogers & Bradford to the drawer. The bill was received and applied as a credit upon the indebtedness, the credit bearing

date on the 11th April, 1861, and was for the sum of $697.10, being the amount of the bill, less a discount of twelve per cent. for the time it had to run before it matured. Appellant being in New Orleans on the 10th of May, 1861, settled with Stewart & James, and gave his notes for the balance due them after deducting the credit for the bill and other payments, which notes, after deducting payments, were taken up and new ones given on the 12th of April, 1862, all of which were paid by the 1st of May, 1866.

It appears that Stewart & James, upon whom the bill was drawn, and to whom it was sent to be applied on the indebtedness to them by Rogers & Bradford, before it fell due and after it was thus sent to them, re-issued it, and delivered it as collateral security to appellee, to whom Stewart & James were indebted. When it matured it was presented and protested for non-payment, and this suit was brought against appellant and Bradford, on their endorsement, to recover the amount of the bill, appellant only being served with process. A trial was had and judgment was rendered against him. To reverse that judgment the cause is brought to this court by appeal, and various errors assigned on the record, but they resolve themselves into one, and that questions the correctness of the judgment on the facts before the court below on the trial.

It is urged, that when the bill was presented to the drawees and taken up by them, it was paid, and lost all vitality, the payees being discharged as endorsers; and that the acceptors, by re-issuing it, might render themselves liable for its redemption, but could not revive the liability of the payees on their endorsement. On the other hand, it is insisted, that, as appellees took the bill before its maturity, although received from the payees, they are *bona fide* holders, and have a right to recover precisely as though it had never been taken up by the acceptors, and had come from the payees or from another endorser; that when Stewart & James took the paper up, they did so as purchasers, and not with the intention of paying it,

but simply discounted it and held it as would any other purchaser, and hence, might negotiate it at any time before maturity, so as to hold the other parties to the bill as well as themselves.

In Story on Bills, sec. 410, it is laid down as a rule, that it is the duty of the acceptor to pay the bill, and by his due payment thereof he discharges all other parties thereto from liability on the bill, either as drawers, endorsers or guarantors, if the payment is rightfully made by him to the holder, without any knowledge of any infirmity in the title of the latter, and, if the names of the parties on the bill through whom the holder derives his title are genuine, and not founded on forgeries. It is said, in Chitty on Bills, 223, (11th Am. Ed.): "But when a bill has been once paid by the *acceptor*, it is *functus officio* at common law; * * and a bill or note can not be negotiated after it has been once paid, if such negotiation would make any of the parties liable who would otherwise be discharged, nor can it be negotiated so as to charge even the endorsers."

In this case, the bill was taken up by the parties who were to pay it, by its terms, and there can be no pretense that the drawees, who were acceptors, could have sued the endorsers for non-payment. Had the acceptors protested it for non-payment and sued the endorsers, no one could have for a moment supposed that they could have recovered. There could be no pretense for such a right. But where the bill was again put in circulation by the acceptor, did innocent holders acquire such a right? Did the taking up the bill, as it was done by the acceptors before maturity, and at a discount, destroy its negotiability before maturity? Was it payment?

It is said, in Story on Bills, sec. 223, that, "Where a bill has once been paid by the acceptor, after it becomes due, (although not if paid before due and the fact be unknown to the holder,) it loses all its vitality and can no longer be negotiated. So, if it be dishonored by the acceptor, and is taken

up by the drawer, he can not negotiate it so as to charge the endorsers, although he might so as to charge himself or the acceptor, if the latter be liable to him." Again, at sec. 417, he says, "In order to make a payment by acceptor good and binding upon all other parties to the bill, it should be made at maturity of the bill, and not before; for, although, as between the real *bona fide* holder and the acceptor, the payment, whenever made, and however made, will be a conclusive discharge from the obligation of the bill; yet, as to third persons, it may be far otherwise; for payment means payment in due course and not by anticipation. If, therefore, the acceptor should pay a bill of exchange, before it is due, to any holder, who should afterwards, and before its maturity, endorse or pass the same to any subsequent *bona fide* endorsee or other holder, the latter would still be entitled to full payment thereof from the acceptor, at its maturity; for payment of the bill before it is due, is no extinguishment of the debt, as to such persons."

In Bayley on Bills, 91, (Am. from the 4th Lond. Ed.), it is said, "If a bill or note be paid before it is due, and nothing be done upon it to mark such payment, an endorsement afterwards, before the time it would have become due, will give the endorsee, if he take it *bona fide*, and for a valuable consideration, the same right as if there had been no such payment."

The same rule is announced in the cases of *Morley* v. *Culverwell*, 7 Mees. & Welsb. 174; *Altenborough* v. *Mackenzie*, 36 Law and Eq. R. 562; *Swope* v. *Ross*, 40 Penn. St. 193; *Eckert* v. *Cameron*, 43 Penn. St. 120. From these cases it would seem that the weight of authority is, that if the note is only discounted before maturity, the bill does not lose its negotiability, but may be again put in circulation, and parties whose names appear on it, bound as though it had not passed through the acceptor's hands. There are other cases which seem to oppose this rule, but the weight of authority is against

them. If, however, it were actually paid, and so understood and intended by the parties, the rule might be otherwise. In this case, the bill seems to have been only discounted, and not paid. Nor does it appear that appellee had any notice of the transaction, and, for aught that appears, he took the bill in good faith. The indebtedness of Stuart & James to appellee was, as has been repeatedly held by this court, a sufficient consideration to support the transfer and to render the bill negotiable, and hence, the defense of appellant is cut off by the transfer of the bill.

The judgment of the court below must be affirmed.

Judgment affirmed.

THE BOARD OF SUPERVISORS OF LASALLE COUNTY

v.

CORNELIUS W. REYNOLDS.

1. COUNTIES—*liability of—for medical services rendered to persons other than paupers.* Under sec. 4 of the pauper act, a liability is imposed upon counties to pay a reasonable compensation to a person who has been legally employed to and does render medical aid to persons falling sick within the county, and having no money or property with which to pay for such services.

2. SAME—*decision of board of supervisors—as to what is a proper allowance in such cases—not conclusive.* In such cases, the obligation of the county is, to allow a reasonable compensation, and the decision of the board of supervisors as to what is a proper allowance, is not conclusive, and if a proper amount is not allowed, an action may be maintained therefor.

3. PAUPERS—*who not considered.* In such cases, persons so falling sick with a contagious disease, are not paupers within the meaning of the statute, and in an action to recover for medical aid so furnished to them, the liability of the county is not affected by the fact, that a "poor house" had been provided in the county, for the reception of paupers. Such an establishment is not designed to

receive persons afflicted with contagious disease, but only those who are technically paupers.

APPEAL from the Circuit Court of La Salle county; the Hon. EDWIN S. LELAND, Judge, presiding.

The opinion states the case.

Messrs. GLOVER, COOK & CAMPBELL, for the appellants.

Mr. H. K. BOYLE, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit, brought to the circuit court of La Salle county, by Cornelius W. Reynolds, against the board of supervisors of that county, for $125, being his charge for medical services rendered by direction of the overseers of the poor, to William Woodbury and Orin Woodbury, who were sick with small-pox.

It was claimed, on the part of the plaintiff, that these diseased persons come within the provisions of sec. 4 of the act concerning paupers. R. S. 402, ch. 80.

The defendants pleaded the general issue, and two special pleas, which were demurred out, and on trial by the jury, a verdict was rendered for the plaintiff for $125, for which judgment was entered.

To reverse this judgment this appeal was taken.

The points made by appellants are, that it was error to instruct the jury that the fact, the account of the plaintiff had been audited by the board of supervisors, and allowed in part, was not conclusive, and that assumpsit might be brought notwithstanding; and that it was error to exclude evidence offered by the supervisors, to show that a "poor house" had been established, and ready for the reception of the poor, and that an entry thereof had been made upon the records of the board.

It is insisted by appellants, the county is not chargeable with the support of paupers within it, except by force of some statute. It was held by this court, in the case of *The Board of Supervisors of Clay County* v. *Plant*, 42 Ill. 328, counties were so liable, and that they are bound by all contracts for the support of such persons, when legally entered into by the proper officer. It was further held, under the township organization law, that as each town was required to elect an overseer of the poor, he alone was authorized and required to perform the duties of the office, and where such an agent has entered into a contract for the support of a pauper, the liability of the county is thereby fixed, and its agents have no discretion, but must discharge the obligation, the chairman of the board of supervisors, having, in such a case, no right, by notice or otherwise, to abridge the powers of the overseer, he deriving his powers from the law, and not from the supervisors.

The court, however, held, where an overseer of the poor should make an extravagant or improvident contract for the support of a pauper, the board of supervisors might reduce the amount to be paid, but until they act, the contract, if fair and unaffected by fraud, will bind the county.

The rulings in the case cited, are applicable, in a great measure, to this case, though the individuals to whom medicines were provided by the overseer, were not paupers in the legal sense, and so averred not to be, in the declaration.

The case is one not affected by the fact that a "poor house" had been provided. Such an establishment is designed for paupers as such, and not for those persons comprehended in the 4th section of the act.

The declaration avers, and such is the proof, that these persons were residents of La Salle county, but not paupers, within the meaning and definition of the statute, but without money or property; that they had fallen dangerously sick of the contagious disease of small pox, and so become a proper charge

on the board of supervisors, for such assistance as was necessary. That the overseer of the poor of South Ottawa, where they resided during the time they were thus sick, complaint having been made to him, employed the plaintiff, then a physician, to render them such medical assistance as was necessary, with an averment that he did, on such employment, render all necessary medical assistance to them.

The account presented by the plaintiff for his services, being $125, was sanctioned by the overseer of the poor of the township, and approved by the supervisor of the town of South Ottawa, but when presented to the board of supervisors of the county, they reduced the allowance to $50, which the plaintiff refused to receive, and brought this suit, claiming on a *quantum meruit.*

The question is, does sec. 4 of the pauper act, impose a liability on the county to pay a reasonable compensation for these medical services? That section is as follows:

"When any non-resident, or any other person, not coming within the definition of a pauper, shall fall sick or die in any county of this State, not having money or property to pay his board, nursing and medical aid, it shall be the duty of the overseer of the poor of the proper district, or if there be none, then of the nearest county commissioner of the county, upon complaint being made, to give or order to be given such assistance to such poor person as they may deem necessary; and if said sick person shall die, then the said overseer or county commissioner shall give or order to be given to such person a decent burial; and the said overseer or county commissioner shall make such allowance for board, nursing, medical aid or burial expenses as they shall deem just and equitable, which allowance shall be laid before the county commissioners' court, and the said court shall allow either the whole or such reasonable and just part thereof as ought to be allowed, and order the same to be paid out of the county treasury."

This section imposes an obligation upon the county authorities to make a proper allowance for medical and other services. If they fail to do so, is there no remedy? Does it vest entirely with them to decide what is a proper allowance? Suppose they should allow but one dollar for such services, would any just man say, that was as much "as ought to be allowed," and no court could give more? This is absurd. The obligation is, to allow what ought to be allowed, and if they fail in this, an action arises. The board of supervisors was not a court trying a cause, whose judgment, when there was jurisdiction, would be binding, but merely acting as a board of auditors. Their decision was not conclusive.

On the remaining point, that the county was not liable, a poor house having been provided, it is sufficient to say, such an establishment is designed for those who are technically paupers, and not for poor persons accidentally smitten with a contagious disease. Small-pox patients would be dangerous inmates in a poor house. The design of this section is not to receive such patients, but only paupers as such.

The statute imposing a legal obligation on the county to provide for these persons, the law raises a promise to pay the person who has been legally employed to render services to them and does render them, such reasonable compensation as he deserves to have. *Seagraves* v. *Alton*, 13 Ill. 373.

Perceiving no error in the record the judgment must be affirmed.

Judgment affirmed.

Syllabus.

I. MARSHALL FREESE

v.

MARGARET L. IDESON, Administratrix of the Estate of JOHN B. IDESON, Deceased.

PARTNERSHIP—*interpretation of particular agreement between partners.* I and F entered into a written agreement, whereby F advanced to I $10,000, to be used by him at his saw mill in Wisconsin, and I agreed to consign to F, at Chicago, all the lumber manufactured by him during a certain period, and which F was to sell, retaining his advances out of the proceeds. F had the option of either selling the lumber by the cargo, or of yarding it, and if he sold in the former mode, he was to have a certain per cent. as his commissions, and if in the latter, one-half of the profits over and above all cost, I agreeing that the cost should not be above a fixed sum. Afterwards, and before any lumber was received under this agreement, a second one was entered into, by the terms of which the former one was continued in force, but as amended by the second, and which created a partnership between them, under the name of I and F, "for the sale of the product of the aforesaid saw mill," and also for the purchase and sale of lumber at Chicago. This agreement provided, that the product of I's mill should be charged to the yard of I & F, at $1.00 per thousand less than the market rates at the time of the arrival of each cargo at Chicago, or should be invoiced to the yard at the net cost of manufacture. The option between these two modes was left to F, who was to make his election and signify it to I within a certain time, and which he did, and elected to take by the former mode: *Held*, that these agreements did not create a partnership in the profits of the lumber manufactured by I, at his mill; that F, by his election, became the mere purchaser of the lumber at a fixed price with reference to the market rates, taking no interest in either the losses or gains that may have attended its manufacture.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

The facts in this case sufficiently appear in the opinion.

Mr. JOHN N. JEWETT, for the appellant.

Messrs. WALKER & DEXTER, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

We should be very glad to reverse this decree, and direct a settlement of the affairs of this partnership upon a basis which would give a fairer compensation to the appellant for his services and capital, if the contract of the parties would permit. But it does not. We have given full consideration to the carefully prepared argument of the counsel of appellant, but the provisions of the written agreements are too plain to be changed by any ingenuity of reasoning. The parties have made their contract, and by that they must abide. It was certainly an unwise one on the part of Freese, but he entered into it voluntarily and without fraud on the part of Ideson. This is admitted by counsel, and it is further admitted that the cross-bill to reform the agreement was properly dismissed, there being no evidence upon which it can stand. Neither is it pretended that the written agreements were ever changed by any other written contract, or that they were abandoned. Whatever they were or meant, they remained in full force up to the death of Ideson, and the rights of the parties must depend on their interpretation.

The only question made in the argument is, whether Freese and Ideson were partners in the manufacture of lumber at the Oconto Mills, in Wisconsin, as well as in the purchase and sale of lumber at Chicago. If the partnership did not extend to the manufacture, it is admitted the decree of the superior court is correct. At the time the first agreement was entered into, on the 13th of November, 1865, Ideson was the owner of the mills and engaged in the manufacture of lumber, and Freese had been engaged in buying and selling lumber at Chicago. By that agreement, Freese advanced to Ideson the sum of $10,000 to be used at his mills, and Ideson agreed to deliver to Freese, at Chicago, all the lumber manufactured between the 1st of March and the 1st of December, 1866, at the rate of about 200,000 feet per week. Freese was to have

the option of either selling the lumber afloat in the Chicago harbor at a commission of 2½ per cent., retaining his advances out of the proceeds, or of yarding the lumber, and in the latter event the profits upon the lumber placed upon the yard, over and above all costs and expenses, were to be equally divided between the parties, Ideson agreeing that the cost, including all expenses, should not exceed ten dollars per thousand. In this agreement there was certainly nothing which can be construed to create a partnership in the mills. Freese loaned his money, and, as a consideration therefor, was to have the consignment of all the lumber manufactured by Ideson, which Freese was to sell. If he sold in one mode he was to have a fixed per cent. as his commission; if in another, his commissions were to be adjusted by a division of the excess of the proceeds of sale over the cost, Ideson stipulating that the cost should not be above a certain sum. In either event, Freese was to get back his money from the proceeds. Freese takes no risk as to the cost of manufacture, except so far as the extent of his profits may depend upon the cost, and even as to them, he limits his risk, by requiring that the lumber shall be furnished to him within a certain price. There is not a word in the agreement tending to make him liable personally for anything connected with the mills.

But on the 1st of April, 1866, and before any lumber had been received under the first agreement, a second and much more minute and carefully prepared contract was executed by these parties. This agreement provides that the former one shall continue in force, but as amended by the one then made, and creates a partnership between the parties, under the name of Ideson & Freese, "for the sale of the product of the aforesaid saw mill," and also for the general purchase and sale of lumber at Chicago. It provides, "that the product of the aforesaid saw mill of the party of the first part, John B. Ideson," shall be charged to the yard of Ideson & Freese at one dollar per thousand less than the market rates at the time of

the arrival of each cargo in the Chicago river, or else invoiced to the yard at the net cost of manufacture, and the option between these two modes is left to Freese, who was to signify his option by a written notice to Ideson, by or before the 1st day of May, 1866. By the acceptance of one proposition he would acquire that interest in the profits of the mills which he now claims. By the acceptance of the other he becomes a mere purchaser of the lumber at a price fixed with reference to the market rates, and takes no interest whatever in either the losses or gains that may attend the manufacture. On the 30th of April Freese signified his option by giving to Ideson the following notice:

CHICAGO, April 30, 1866.

JOHN B. IDESON, ESQ.:

As per stipulation in our articles of agreement, we hereby notify you that we will receive the product or cut of all good merchantable lumber of the Oconto Mills, at Oconto, Wis., at the rate of $1.00 less per thousand feet than the cargo lumber market price at the time of the arrival of each and every cargo in the Chicago market; at which rate of $1.00 less per thousand feet than the cargo price at the time of its arrival, each cargo is to be invoiced to the lumber firm of Ideson & Freese.

I. M. FREESE & CO.

By this notice Freese elected to take the lumber at one dollar per thousand less than market rates, instead of incurring any risk as to the cost of manufacture, or participating in its profits.

The result has proved that he made a very unfortunate choice. But nevertheless he made it, and he did so deliberately, and without fraud or coercion. The estate of Ideson is to receive a very large profit from the manufacture of the

lumber, and Freese a very small one from its sale. But it is the result of his own free and well-considered act.

That this instrument, in connection with the notice of the 30th of April, excludes all idea of partnership in the mill, is a proposition hardly admitting of argument.

A large amount of evidence has been taken for the purpose of showing the circumstances of the parties, their acts, admissions and declarations, their printed cards and circulars, in which "our mills at Oconto," and "our manufacturing and shipping facilities," are mentioned, the mode adopted by the parties in keeping their accounts and transacting their business, and it is urged that all this evidence is, in the language of counsel, "a demonstration amounting to moral certainty that the written memoranda between Ideson and Freese do not contain all the agreement of the parties." But that another agreement has ever been reduced to writing is not pretended. And do counsel expect us to take evidence of this nature, much of it contradictory, and nearly all of a nature which courts regard with jealousy in any case, and out of its *disjecta membra*, construct a contract on the theory of probabilities, with which to overturn another contract carefully prepared, deliberately reduced to writing, and signed and sealed by the parties? Could we make a decision more fraught with mischief? The object of persons in reducing their contracts to writing is to place them beyond dispute, and such contracts the law scrupulously guards against the encroachments of parol evidence, yet the decision we are asked to pronounce would break down the sanctity of written instruments, and leave the courts to substitute in their place such contracts as they may choose to infer from careless conversations or partially understood acts. Let this be law, and no care or solemnity in the execution of written contracts would render them safe.

We do not deem it necessary to discuss in any detail the evidence offered, for the reason that, if it were vastly stronger

than it is, it could not overturn the written agreement of the parties. The argument is, that they did and said certain things indicating that they construed their written agreements as creating a partnership in the profits of lumber manufactured at the Oconto Mills, or that, if they did not so construe these agreements, they must have had some other and outside contract. Yet, when we turn to these agreements, we find they do not create such a partnership, but as clearly as possible repudiate it, and if acts or declarations to the contrary are quoted, we can only say that here, in these written agreements, are we to look for the relations of the parties upon this question, and they admit of but one construction. As to a different contract, modifying the written agreements, we can not construct it, upon conjecture, from the evidence here offered, without violating the best settled rules of law.

Before leaving the case it may be remarked, that although the counsel of appellant characterizes these agreements as memoranda, the one last executed is much more than a memorandum, if by that term is meant a hastily prepared or ill-considered instrument. Its phraseology may indicate that it was not drawn by one learned in the law, but it is nevertheless drawn with great care, for the purpose of defining the relations of the parties, and its various provisions, in regard to minor matters, show with what full consideration it was prepared, signed and sealed.

The decree must be affirmed.

Decree affirmed.

Syllabus.

STEPHEN HASSETT

v.

NICHOLAS H. RIDGELY.

1. PARTITION—*in proceedings for—all persons having an interest must be made parties.* In proceedings for partition, the statute requires, that every person having an interest in the subject matter, shall be made a party, and where persons holding such interests are not made parties to the proceedings, and afforded an opportunity of being heard in defense of their rights, they cannot be deprived of their property, or otherwise bound by such proceedings.

2. COLOR OF TITLE—*judgment in partition.* The judgment of a proper court making partition, purports on its face to convey title, and when valid, vests the title absolutely in the parties as though deeds were executed; and although in the suit in which such judgment was rendered, a part of the tenants in common were not made parties, nevertheless, such judgment constitutes color of title, and where a bar under the statute of limitations has been acquired, a recovery may be had under it to regain possession that has been invaded, and a claim under the outstanding title previously owned by the persons who were not made parties in the partition suit, cannot be set up to defeat it.

3. STATUTES—*construction of 1st and 2d sections of limitation act of 1839—color of title.* A person relying upon color of title, need not exhibit a perfect chain of title, or go back of the instrument which constitutes his color of title, nor can it be defeated by showing a defect in the title, antecedent to the instrument relied upon as color, or by showing that his color of title was not connected with any source of title.

4. LIMITATION OF ACTIONS—*extent of possession—what constitutes.* Where a party having color of title of land, subdivides it into blocks and lots, streets or other subdivisions, actual possession of the lots by himself, or by his tenants, is a sufficient possession, within the statute, of the whole tract.

5. It is not necessary that he should reside upon every part and parcel of the tract, as the streets and lines of lots in no wise destroy the unit, or identity of the property, or limit the possession.

6. SAME—*what will destroy entirety of possession.* But if he sells a portion of the tract, so as to separate a part from that of which he had actual possession, the unity of the property and the possession is destroyed, and possession does not extend to the isolated portion.

7. INSTRUCTIONS—*in ejectment.* Where in an action of ejectment, it appeared, that the plaintiff, claiming under a judgment in partition, had paid the taxes on

the property for a period of seven years from the time partition was made, and during that time the land was vacant and unoccupied, and he subsequently entered into the possession of the same; *Held*, that no error was committed in refusing an instruction to the effect, that if the jury believed, from the evidence, that there were squatters on the premises, at a time *after* the bar of the statute had occurred, the plaintiff could not recover. This instruction applied only to an occupancy after the bar had become complete, and had it been given, would have excluded all the evidence with reference to the payment of the taxes during the running of the statute.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

The opinion states the case.

Mr. JOHN BORDEN and Messrs. GOOKINS & ROBERTS, for the appellant.

Mr. D. B. MAGRUDER, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of ejectment, brought by appellee, in the circuit court of Cook county, against appellant, for the recovery of certain blocks and lots in Ridgely's addition to the city of Chicago.

It appears that David Elston purchased the quarter section in which this property is situated, from the general government, and received a patent for the same. The patent calls for 160 acres. Elston first conveyed an undivided 60 acres of the quarter to one Hubbard. Afterwards, on the 21st of July, 1836, he also conveyed, by deed, an undivided part of three-sixteenths, or 30 acres, of the quarter to William L. May, which was recorded the 19th of August, 1836. May then began to sell portions of his 30 acres, describing them as undivided portions of the quarter. To John A. Underwood,

October 18, 1836, he thus sold an undivided 5 acres; to George Tucker, on December 3, 1836, 2 undivided acres; Stetson Lobdell, on December 3, 1836, 2 undivided acres; Daniel Vail, 2 undivided acres; to appellee, 14 undivided acres of the quarter, on the 4th of October, 1838, and the deed was recorded on the 8th of the same month.

In August, 1839, Elston and Hubbard commenced a proceeding in partition, in the circuit court of Cook county, to have their interests assigned to them severally. May, or his grantees were not named as parties, but the proceeding was against the other unknown owners. The order for a partition was rendered on the 20th of July, 1842, and it found that Elston owned 70 acres, Hubbard 60, and the unknown owners 30 acres. The commissioners made a division, and assigned to the unknown owners 30 acres in the north-east corner of the quarter, and their report was confirmed by the court.

Subsequently, appellee commenced a proceeding in partition in the Cook County Court, to have his interest set off and assigned to him in severalty. He made Underwood, Tucker, Cook, who had purchased of Lobdell, Vail and May, parties. May was served with process, and publication was made as to the other defendants, and Underwood, Tucker and Cook entered their appearance. While the proceeding was pending, May sold his interest in the premises, being 5 acres, to Justin Butterfield, which appears from a recital in the record of the proceedings, and by amendment of the petition. Butterfield was made a party. The deed from May to Butterfield was executed on the 12th of June, 1846, and recorded on the 30th of the same month.

In May, 1847, final judgment was pronounced in this proceeding, on the report of the commissioners, vesting the title to 15 acres in the north-west corner of the 30-acre tract, in appellee; 5 acres in the south-east corner in Butterfield; 3 acres, west of Butterfield's, in Cook; $1\frac{1}{4}$ acres west of Cook's in Vail; $3\frac{94}{100}$ acres, west of Vail's, in Underwood, and $1\frac{85}{100}$ acres,

west of Underwood's, in Tucker. These seem to have been the only parties in interest, so far as the records disclosed when this partition was made.

It, however, appears, that prior to that time, and on the 31st of January, 1837, May sold to Greenville Sharp Pattison, an undivided 1-40th, or 4 acres, of this quarter, but this deed was not recorded, nor was it ever acknowledged. Pattison conveyed this interest to James Dundas and John R. Vodges, on the 12th of January, 1838, the deed for which was recorded on the 24th of May, 1838, and it refers to the deed made by May to Pattison. Vodges and others conveyed to Jones, under whom appellant was in possession when the suit was commenced.

It appears, that after the partition in the proceeding by appellee was had, he proceeded to plat the portion allotted to him into blocks, lots and streets, as an addition to the city of Chicago. And Butterfield and the other defendants sold all or a portion of the tracts allotted to them.

It is not contended, nor can it be, that the partition made in the proceeding instituted by Elston, was not regular and binding. The court had jurisdiction of the subject matter, and of the parties in interest, the unknown owners having been brought into court by publication in the mode prescribed by the statute. Each of the petitioners had allotted to him his share in severalty, and the unknown owners their shares in common, in the 30 acres in the north-east corner of the quarter. That partition remains in full force, and must be taken to be binding upon the parties, as well as their privies.

The question, however, is presented, whether the partition had on the application of appellee, was such as separated the interest held by him in common with the other owners, or whether it remains unaffected by that proceeding. It appears that Dundas and Vodges then owned four undivided acres in that tract. It is true, the deed from May to Pattison was not recorded, but Pattison's deed to them had been, and it

referred in express terms to the deed from May to Pattison, by its date and as having conveyed that interest. Every person examining the records and reading that deed, would have been informed of the fact that Dundas and Vodges claimed title to an interest amounting to four undivided acres, through May. Appellee, therefore, had the means of learning that they claimed to be owners of an undivided interest in the 30 acres, and he should have made them parties. The statute requires all persons having an interest in the property to be made parties to a proceeding for a partition. They were owners of that interest, and had a right to be heard in defense of their own rights, before they could be deprived of their property, or otherwise bound by any judgment which might be rendered. It is a fundamental principle of the law, that all persons must be parties to a legal proceeding and afforded an opportunity to be heard before they can be bound by such proceeding. In this case, no such opportunity was afforded them, and they are not bound by the judgment of partition or other proceedings, nor did the action of the court in that case affect their titles, or convert their undivided interest into a separate parcel. That proceeding, therefore, did not bar their right to claim and assert their title to their shares.

It is, however, claimed that although the partition may not have been binding on persons not made parties, and failed to give appellee his interest in severalty, it does constitute claim and color of title, made in good faith; and that possession and payment of taxes for the requisite statutory period, would present a a sufficient bar to an action of ejectment, and that if such a bar has been acquired, a recovery may be had under it, to regain possession that has been invaded; and that a claim under the outstanding title, previously owned by Dundas and Vodges, cannot be set up to defeat it. In partitions at law, where the court has jurisdiction, the judgment vests the legal title to the portion assigned to the owners. In such cases, an exchange of deeds by the several owners is not necessary for the purpose.

Street v. *McConnell*, 16 Ill. 125; *Chickering* v. *Failes*, 29 Ill. 294; *Gregory* v. *Grover*, 19 Ill. 608. And the proceeding for partition under our statute is similar in its effects to the ancient writ of partition. The statute has but extended and regulated the remedy. It then follows, as a consequence, that a judgment under our act, vests the title in the owners as it did at common law. *Louvalle* v. *Menard*, 1 Gilm. 39; *Howey* v. *Goings*, 13 Ill. 85; *Grennup* v. *Sewell*, 18 Ill. 50.

This court has repeatedly held, that the deed or instrument relied upon as color of title, must purport on its face to transfer or convey title. *Bride* v. *Watts*, 23 Ill. 507; *Dickenson* v. *Breeden*, 30 Ill. 279; *McCagg* v. *Heacock*, 34 Ill. 476; *Shackleford* v. *Bailey*, 35 Ill. 387. It has likewise been held, that a judgment in partition at law, vests title in the several owners in the shares assigned to each as effectually as would deeds interchangeably made by the parties. *Street* v. *McConnell* and *Louvalle* v. *Menard*, *supra*. If, then, the judgment of the court approving the division and partition made by the commissioners, and confirming the title in the owners of their several parcels thus assigned to each, vests the title in them, then such a judgment purports to transfer or convey title. It purports to do this as effectually and precisely as would deeds interchangeably made by the tenants in common. It must, therefore, follow, that such a judgment is within the reason and policy of the law, and must be held to be color of title. In an ejectment suit, to trace title, it would be as necessary to introduce such a judgment as any other link in the title of which it forms a part.

In *Chickering* v. *Failes*, *supra*, it was held that an ineffectual attempt at a strict foreclosure of a mortgage, might be relied upon as color of title; that the mortgage having transferred the legal title to the mortgagee, when he obtained a decree of strict foreclosure, it purported to vest the whole title, equitable and legal, in the mortgagee. That it apparently terminated the fiduciary relation which existed between the

mortgagor and mortgagee, and when relied upon and held by the latter as his own property, it might be regarded as color of title, and interposed as such against a grantee of the mortgagor. In that case, the assignee of the equity of redemption was not made a party to the suit to foreclose the mortgage. And in that particular, that and this case are similar in prinple, where the act of the law, if regular, would pass title, if from any cause defective, should be held color of title as effectually as a deed which purports, but fails, to pass title. We have, therefore, no hesitation in holding that the judgment of a proper court making partition, although a part of the tenants in common may not have been made parties, is, nevertheless, color of title, and where the other requirements of the statute have been performed, may be effectually interposed as a bar.

This view of that question necessarily disposes of the question of defective description of the land in May's deed to appellee, as well as other objections interposed to the title anterior to the judgment of partition. This court has repeatedly held, that the person relying upon color of title, need not exhibit a perfect chain of title, or even go back of the deed or instrument which constituted color of title, nor will his color of title be defeated by showing some defect in the title, antecedent to the instrument relied upon as color, or even by showing that his color is not connected with any source of title. And this is the true construction to both the first and second sections of the act of 1839.

We then come to the question of whether appellee has shown a compliance with the other requirements of the statute. It seems from the evidence, that he paid all taxes on the 15 acres assigned to him, from the time the partition was made in 1847, until in the spring of 1865. The first payment made after the partition occurred was in November, 1847, and the last in 1864, making a period of about 16 years. It is true, that all of the receipts were not produced on the trial, but there was oral testimony, from which a jury would have been warranted

in finding such payments. And under these payments, appellee claims that he has brought himself within the provisions of both the first and second sections of the act of 1839. That during the first seven years in which he paid taxes, he had color of title made in good faith; that he paid all taxes legally assessed upon the land, and that it was vacant and unoccupied during that time. That during the last seven years he was in possession, under color of title and the payment of taxes. These were questions of fact for the jury to determine, but appellant complains that they were misled by the instructions given by the court, and that proper instructions asked by him were refused.

It is impossible, from the nature of things, to lay down any precise and definite rule as to what shall constitute actual possession of land. The owner cannot be actually present on every part of a tract of land at the same instant of time. He can be personally present upon but a small space of ground at the same instant; nor can his dwellings and the curtilage occupy but an inconsiderable portion, and it frequently occurs that it is inconvenient, if not impracticable to enclose it with a fence. Hence the rule has obtained, that a residence upon, or the improvement of, a part of a tract for use, is held to be actual possession of the whole tract or body to which he holds title. And this, no doubt, extends to a number of smaller tracts or subdivisions adjoining each other, and forming but one body. A residence or an improvement upon one legal subdivision would extend the possession to other adjoining legal subdivisions, forming an entire body of land to which the possessor of the dwelling or improvement held conveyances. Nor would the case be altered, if the land was intersected in different directions with public highways, over which the community had the right to travel. We presume no one would contend, that because a public road run through a quarter section or other legal subdivision, upon which a person had a farm, and which separated his fields, or the improved from the unimproved portion of his

land, he would not be in the actual possession of the portion separated from the improvements by the highway.

Nor do we perceive that it can make any difference where a person subdivides a tract of land into blocks, lots and streets, or other subdivisions, so long as he owns or has color of title to all of the property. The mere fact that he has established imaginary lines to designate divisions of the property, and to indicate over which part the public may pass, cannot matter, any more than the division of a farm by lanes or other public highways. If, however, he were to sell a portion, so as to separate a part from that of which was in actual possession, then the unity of the tract and the possession would be destroyed, and the possession could not be extended to the isolated portion. The tracts would then be separate and distinct. The separation of a farm into different enclosures, would not render the tracts thus enclosed separate, nor would it destroy the entirety of the possession. Then why should a line run by a surveyor's compass, which does not even leave a trace behind, be more potent, and work a separation of the tract or destroy his possession, when fences, lanes, or public highways on a farm, do not produce such results. We are clearly of the opinion, that such lines cannot produce such results.

If appellee was in the actual possession of a portion of this tract of 15 acres, by his tenant, no reason is perceived why it would not extend to the entire tract, unless some portion of it was actually separated from the portions thus in actual possession by intervening owners or adverse occupants. If Mrs. Burke, who had previously been a mere trespasser, was by agreement permitted to remain and occupy the house, and was to guard the entire property against trespassers, and give notice to appellee's agent if efforts were made to settle upon the tract, she thereby became the tenant of appellee, holding under him and recognizing his title; and her possession was his, and the same in effect as would have been his, had he occupied the premises as she did. And it does not matter

whether this arrangement was public or private, as all persons having, or claiming to have, an interest in this 30-acre tract, finding her in possession of a part of it, could have readily learned the extent of appellee's claim, and the relation she occupied to the premises. Her possession seems to have been open, visible, and apparently exclusive, and of that character which usually arrests the attention of those claiming title to the land thus occupied. Notwithstanding the tenement in which the tenant resided was humble, it constituted an occupancy, and was sufficient to constitute possession; and, as we have seen, the streets and lines of lots in no wise destroyed the unity or identity of the property, or limited the possession. *Williams* v *Ballance*, 23 Ill. 193.

The court below gave a number of instructions, which embraced the views here expressed, as well as other rules that cannot be controverted. Appellant asked, and the court refused to give, this, among other instructions:

"That if the jury find, from the evidence, that Mrs. Burke resided on what is now block 8 of Ridgely's subdivision, and claimed to be there in 1856 or 1857, as tenant of the plaintiff, under the arrangement mentioned by the witness, Kerfoot, yet after Green street was actually opened as a public street, and thrown up and used as such, her possession would not extend west of said street, so as to be actual possession of the land lying west thereof, which would be notice to any adverse claimant of such land on the west."

It would be error to have given this instruction. It asserts that, a street intervening, between the portion of the 15 acres on which the house of the tenant was situated and other portions of the tract, her possession did not extend beyond the street. This would have been opposed to the reasons we have here expressed, and would, in effect, limit possession to the yard of the owner of a farm, or to the field in which he

lived, and prevent his possession beyond a public highway passing through his farm. And we have seen that a street is but a passway over which the public may travel, and is but a public easement, granted by the former owner, which may be controlled by municipal authority.

The 9th instruction asked by appellant was also refused by the court, and that decision is assigned for error. It is this:

"If the jury believe that there were squatters upon the 15-acre tract claimed by Ridgely in 1856, as testified to by Kerfoot, and that he completed their removal, as stated by him in his evidence, on or about May 12th, 1857, then the plaintiff has wholly failed to show himself entitled to recover the premises in question upon the ground of tax payments thereon, as vacant and unoccupied land, for the reason that the presence of the said squatters on the property as aforesaid, prevented the property from being vacant and unoccupied land for the period required by law."

There was evidence before the jury tending to prove that the taxes had been paid on this land from at least the 26th day of November, 1848, until the same date in 1855, which makes seven years, and if so, and the land was during that time vacant and unoccupied, appellee brought himself within the second section of the statute, if he subsequently entered into possession of the property. On this state of facts, it would, therefore, have been erroneous to have given this instruction, which only refers to an occupancy in 1856 and 1857. This instruction would, virtually, although not in terms, have excluded all of the evidence in reference to the payment of taxes prior to 1856, while we have seen that there was evidence properly before the jury tending to prove seven years payment of taxes while the land was vacant and unoccupied. This instruction was, therefore, properly refused.

Upon this entire record, we are unable to discover any error for which this judgment should be reversed, and it must be affirmed.

Judgment affirmed.

Mr. JUSTICE LAWRENCE dissenting:

I cannot concur with the majority of the court, in holding that an actual possession of a lot upon one side of a travelled street in a city, is also a sufficient possession, within the statute of limitations, of a lot in fact vacant upon the opposite side, even though both lots are held under the same title.

JOHN BECKER

v.

THOMAS WILLIAMS.

TRUSTS AND TRUSTEES—*property conveyed to a person to pay debts.* G conveyed to B certain lands, with the power to sell them and apply the proceeds in the payment of G's debts. B sold the lands, and, to the extent of the proceeds received, applied them in payment of G's debts: *Held*, in an action against B, by a creditor of G, whose claim had not been paid, that B could not be held liable for a misapplication of the funds, there being no proof that B, on receiving the deed, had agreed with G to pay this claim as a preferred debt.

APPEAL from the Circuit Court of Knox county; the Hon. ARTHUR A. SMITH, Judge, presiding.

The opinion states the case.

Mr. T. G. FROST and Mr. P. H. SANFORD, for the appellant.

Mr. A. M. CRAIG, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

Thomas Williams had a claim against one Martin Gibbs, who conveyed to John Becker a certain tract of land, with power to sell it, and with the proceeds to pay Williams and other creditors. Becker sold the land, but did not pay Williams' debt, and this action was brought before a justice of the peace, by Williams, against Becker, for the debt due him from Gibbs. This was the statement of the plaintiff's case, and he recovered a judgment for the amount of his claim.

The cause was taken to the circuit court by appeal, and the same judgment rendered. To reverse this judgment the cause is brought here by appeal.

We have examined the record, and find nothing in the evidence showing an undertaking on the part of Becker to pay the debt due from Gibbs absolutely. He was only to apply the proceeds of the land in payment of Gibbs' debts, and as they have been fully applied, Becker is not liable to Williams unless he had agreed with Gibbs, on receiving the deed, to pay the debt to Williams as a preferred debt, and had disregarded his trust in the application of the funds.

The case should have been put to the jury on this theory. As it was left to them, the plaintiff should not have recovered. The verdict is against the whole evidence, and should have been set aside.

The judgment is reversed and the cause remanded.

Judgment reversed.

ALBERT PHELPS, Administrator, &c.

v.

DANIEL REYNOLDS.

ASSESSMENT OF DAMAGES—*by the clerk.* Where, in an action of assumpsit, against the acceptor of an order for a definite sum of money, conditioned to be paid upon the sale of certain real estate, the declaration averred that such real estate had been sold, and judgment was taken by default, the damages rested merely in computation, and might be assessed by the clerk of the court.

WRIT OF ERROR to the Circuit Court of Kane county; the Hon. SYLVANUS WILCOX, Judge, presiding.

The opinion states the case.

Mr. R. L. DIVINE, for the plaintiff in error.

Mr. R. N. BOTSFORD, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of assumpsit, brought by Reynolds, the payee, against Walker, the acceptor of the following instrument, this writ of error being prosecuted by Phelps, his administrator:

"WM. G. WALKER—Sir:

"Please pay Daniel Reynolds, or bearer, the sum of four hundred dollars, with use, when the real estate of Benjamin Walker is sold, and charge the same to me in my interest in said estate, it being for value received.

"ABEL WALKER.

"PLATO, May 15th, 1857."

There was a judgment by default, and the clerk assessed the damages. This assessment by the clerk is the only error assigned. But in this there was no error. The declaration averred the real estate of Benjamin Walker had been sold. This averment was admitted by the default. Upon such sale the instrument became absolutely payable, and the damages rested merely in computation.

The judgment of the court below is affirmed.

Judgment affirmed.

CHARLES D. CHAPMAN *et al.*

v.

JAMES KIRBY.

1. LEASE—*forfeiture—at common law—for non-payment of rent.* The right of forfeiture for non-payment of rent, being a harsh remedy, has never been favored by the law, and where a lease provides for such forfeiture, the landlord is required, at common law, before he can declare a forfeiture, to make a demand for the rent on the day it falls due, for the precise amount, and at a convenient hour before sunset, at the place specified in the lease, or on the premises if no place is named. Such demand must be made in fact, although no person be present.

2. SAME—*what will not be deemed a valid declaration of a forfeiture—so as to terminate a lease.* P leased to K a portion of certain premises, together with a specified quantity of steam power, at a stipulated rent, payable on the first day of each month, from May 1st, 1864, to January 1st, 1869. The steam power thereby leased was to be communicated from lessor's engine, through a shaft to K's machinery. The lease provided for a forfeiture for non-payment of rent. K failed to pay the rent due on the 1st day of May, 1867, and the lessor, on the 7th day of that month, caused to be served upon K, a written notice, notifying him that, by reason of such default, he had elected to terminate the lease at the expiration of ten days thereafter. The person serving such notice was instructed, by the lessor, not to receive the rent, if K should offer to pay it,

which he did offer to do within the ten days after the service of the notice, and it was refused. On the 1st of June following, the lessor severed the connecting shaft, whereby K was supplied with the steam power, and his machinery stopped. In an action by K against the lessor, to recover the damages sustained by reason of such act: *Held*, that there was no valid declaration of a forfeiture by the landlord, so as to terminate the lease and authorize a re-entry; that K's offer to pay the rent within ten days, and the lessor's refusal to receive it, were tantamount to payment, and saved the lease from a forfeiture.

3. SAME—*payment of rent made within the ten days after notice—lease saved from forfeiture.* In giving construction to the act of 1865, this court has said, that if the tenant pays the rent in arrears within the ten days after service of the notice, a forfeiture of the lease is thereby prevented. *Chadwick* v. *Parker*, 44 Ill. 326.

4. SAME—*mere non-payment of rent—will not authorize the landlord to enter and forcibly expel the tenant or remove tenements or appurtenances.* Under such lease, K acquired the same right to the use of the steam power that he did to occupy the premises, and his failure to pay the rent no more authorized the landlord to cut off such power than it did to enter upon the premises, and forcibly dispossess the tenant thereof. Mere non-payment of rent does not authorize the landlord to enter upon and forcibly expel the tenant, or to remove the tenements or their appurtenances, or any part of them.

5. DAMAGES—*measure of—for destruction of business—in consequence of cutting off the steam power.* And in such case, where the evidence showed, that in consequence of the act of the landlord, in cutting off the steam power, the lease was rendered valueless, and the stock in trade and machinery of the tenant became depreciated, and his business destroyed: *Held*, that these were all proper elements for the consideration of the jury in ascertaining the measure of damages.

6. SAME—*concerning the profits.* And in estimating the losses sustained, by reason of the destruction of plaintiff's business, it is proper for the jury to take into consideration the extent of plaintiff's business, and his profits for a reasonable period next preceeding the time when the injury was inflicted, leaving the defendant to show, that by depression in trade, or from other causes, the profits would have been less.

7. SAME—*in trespass.* In all actions of tort, the measure of damages is not less than the amount of injury sustained, and in case, all of the consequential damages sustained, connected with, or flowing from the act complained of.

8. SAME—*must be real.* But the damages must be the necessary and natural result of the act, and must be real, and not speculative or probable.

9. LEASE—*after unlawful entry—tenant had a right to dispose of his property.* After the landlord had cut off the power from the tenant's machinery, the

tenant had a right to presume that such power would not be restored, and was under no obligation to hold his machinery and stock undisposed of until the end of his term, but could dispose of his lease, stock and machinery, on the best terms he could obtain, and the landlord would be liable for any loss thereby sustained.

10. DAMAGES—*what may be recovered—for an unlawful re-entry.* And in such case, the party injured is entitled to recover damages for all the injury he has sustained, which was the necessary and natural consequence of the wrongful act.

11. FORMER DECISIONS. The cases of *Green* v. *Williams*, 45 Ill. 206, and *Cilley* v. *Hawkins*, 48 Ill. 308, are not in conflict with the doctrine expressed in this case.

12. DAMAGES. Nor, in such case, can the plaintiff be confined, in estimating his damages, to the value of the lease during the period from the time the power was withheld until it was connected with the machinery, some five months afterwards. Having been deprived of the power, and his business thereby destroyed, he had a right to presume that it would not be restored, and to sell out his effects, and after such sale he was under no obligation to re-establish his business.

APPEAL from the Superior Court of Chicago.

The opinion fully states the case.

Messrs. DENT & BLACK, for the appellants.

Messrs. SPAFFORD & MCDAID, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears, from the evidence in this case, that Pomeroy Brothers, on the 1st day of May, 1864, were the owners of a planing mill and premises in the city of Chicago, and by a deed duly executed, leased to appellee a portion of the premises and a quantity of steam power, which was specified, from the 1st day of May, 1864, until the 1st day of January, 1869, at a specified rent. Lessors reserved the right to stop for reasonable repairs when required, but such repairs to be made with the least possible delay; lessors covenanted for the use

and enjoyment of the premises and power during the term, and appellee covenanted, on his part, as follows:

"*It is expressly understood and agreed*, by and between the parties aforesaid, that if the rent above reserved, or any part thereof, shall be behind or unpaid on the day of payment whereon the same ought to be paid, as aforesaid, or if default shall be made in any of the covenants or agreements herein contained, to be kept by the said party of the second part, his executors, administrators and assigns, it shall and may be lawful for the said parties of the first part, their heirs, executors, administrators, agent, attorney or assigns, at their election, to declare said term ended, and into the said premises, or any part thereof, either with or without process of law, to re-enter, and the said party of the second part, or any other person or persons occupying in or upon the same, to expel, remove and put out, using such force as may be necessary in so doing, and the said premises again to re-possess and enjoy, as in their first and former estate. * * * * And if at any time said term shall be ended at such election of said parties of the first part, their heirs, executors, administrators and assigns, as aforesaid, or in any other way, the said party of the second part, his executors, administrators and assigns, do hereby covenant and agree to surrender and deliver up said above described premises and property, peaceably, to said parties of the first part, their heirs, executors, administrators and assigns, immediately upon the determination of said term as aforesaid, and if he shall remain in possession of the same ten days after notice of such default, or after the termination of this lease, in any of the ways above named, he shall be deemed guilty of a forcible detainer of said premises, under the statute, and shall be subject to all the conditions and provisions above named, and to eviction and removal, forcibly or otherwise, with or without process of law, as above stated."

It appears that Pomeroy Brothers assigned their lease to A. C. Hesing, and he to appellant, Chapman. Appellee paid rent to Pomeroy Brothers until they assigned their lease, and afterwards to Chapman. But after the 1st of April, 1867, no rent was paid, but it seems to have been tendered after the notice of the 7th of May was served on appellee notifying him that appellant elected to terminate the lease after the expiration of ten days, for the previous failure to pay rent on the 1st of May. On the 1st of June, 1867, Chapman severed the connecting shaft, just outside of the portion of the premises held by appellee, which connected with the engine and supplied appellee with power, and thus stopped his machinery. And for this act, on the part of Chapman, appellee brought an action on the case, to recover for the damages he claims to have sustained, and on a second trial in the court below the jury found a verdict for five thousand dollars in favor of appellee. A motion for a new trial was entered, which the court overruled and rendered a judgment on the verdict, and the case is brought to this court on appeal, and a reversal is asked upon several grounds.

It is claimed that appellants had the right to enter, as soon as appellee failed to perform his covenants, and that when they gave notice in May that they would terminate the lease because the rent was not paid, they did all that was required of them before they broke the connection and stopped the power.

The right of forfeiture being a harsh remedy, and liable to produce great hardship, if not oppression, has never been favored by the law, and hence, before a lease can be declared forfeited, the law requires a strict compliance with several important pre-requisites. Among them is a demand of the rent on the day it falls due, for the precise amount, at a convenient hour before sunset, on the land, if no place is named, or at the place specified in the lease for its payment; a demand must be made, in fact, at the place, although no person be present, and there must be a failure or refusal at the time to

make payment. Where these things were all done, the common law authorized the landlord to declare a forfeiture if the lease provided for such forfeiture. In this case none of those things were done, and hence, the case does not fall within the common law rule, and no forfeiture occurred from the giving of the notice of the 7th of May.

If it be urged that there was a valid declaration of a forfeiture, so as to terminate the lease and authorize a re-entry by appellants under the statute, it will be found that the act of 1865 has not been complied with by appellants. The notice was served on appellee on the 7th day of May, 1867, and appellants instructed their clerk, who served the notice, not to receive the rent if appellee offered to pay it, and he offered to pay it, and the money was refused, within the ten days after the service of the notice. It was held, in the case of *Chadwick* v. *Parker*, 44 Ill. 326, in giving a construction to this statute, that ten days' notice must be given, and that the tenant may pay the rent in arrear within that time and prevent a forfeiture. We see that appellee did all he could to pay the rent then due, but it was refused, and the offer and refusal were tantamount to payment, and saved the lease from a forfeiture. We do not deem it necessary to determine whether the law of 1865 can apply to and govern leases entered into and executed before the passage of that law; nor, in the view we have taken of the case, do we propose to discuss the question of whether any person but the assignee of a reversion, or the holder of such reversion, can legally declare a forfeiture. In this view of the case, all questions arising on the instructions in reference to the forfeiture and the non-payment of rent or its tender, were properly refused.

When appellee received the lease, he acquired by it a right to the use of the power communicated from appellants' engine, through the shaft from appellee's machinery, as fully as he did to occupy the buildings and premises. It formed a part of the lease, and a failure to pay the rent did not any more

authorize appellants to withhold the power than it did to enter upon and dispossess appellee of the buildings and premises demised. It has never been held that the mere non-payment of rent would authorize the landlord to enter upon and forcibly expel the tenant, or to remove the tenements or their appurtenances, or any part of them. Hence, the failure to pay the rent did not authorize appellants to resume the power communicated by their engine, as it was appurtenant to the leased premises. A lessor of a mill operated by water would have no right to shut off or divert the water which afforded the power, because his tenant failed to pay the rent, any more than to remove the building itself. The seventh of appellants' instructions was, therefore, properly refused.

We now come to the consideration of the question of the measure of the damages. It is objected, that on this point improper evidence was received, and improper instructions given; and in permitting the jury to find damages beyond the time when the suit was brought. The court below admitted evidence to show the extent of appellee's business and profits during the six months previous to the withholding of the power from appellee's machinery, to enable the jury to estimate the amount of damages he sustained. The court, on this question of damages, also instructed the jury, that if they found for appellee, in estimating his damages they could consider the nature and extent of his business at the time the power was withdrawn, the amount of business he had done during the six months previous, together with loss on stock, machinery and buildings, or other losses shown by evidence, which were necessarily sustained by appellee by reason of withholding the power and interfering with his beneficial enjoyment of his leasehold estate.

This was an action on the case, and not on contract. In all actions of tort, the measure of damages is not less than the amount of damages sustained, and in case, all of the consequential damages sustained, connected with or flowing from

the act complained of by the plaintiff. But the damages must be the necessary and natural consequence of the act. They must be real, and not merely speculative or probable. And if, by withdrawing the steam power on the 1st of June, and a failure to restore it until the 1st of November following, his leasehold estate became reduced in value, and his stock and machinery were depreciated, and his business was broken up, and his customers were diverted to other places of business, these were all proper elements for the consideration of the jury in ascertaining the amount of damages sustained by appellee. And if all these things did occur, and were the direct result of appellants' wrongful act, they should make good the loss. It can not be held that, after the power was withheld, appellee should remain inactive, hold his machinery, unfinished stock and fixtures, until the end of his term, undisposed of, and his capital tied up and yielding him nothing. No rule of law or principle of justice could require such a course. When the power was withheld, appellee had a right to suppose that it would be permanent, and to dispose of his lease, stock, machinery and fixtures on the best terms he could obtain. And there can be no doubt that appellants should be held liable for any loss that might be sustained by such a sale.

Appellants having committed the wrong, must be held liable for all losses that flow from it. And if the loss on these various articles was the necessary and proximate result of the act,—and of that the jury must judge from the evidence,—they must be held liable. It can not be said that, when the lease has been destroyed or rendered valueless, the buildings, machinery, and stock in trade have been depreciated, and a lucrative business destroyed by the wrongful act of another, the sufferer shall only receive nominal damages, or the mere damages equal only to the value of the lease over and above the rent. The person thus wronged is entitled to recover for all of the injury he has sustained.

As to the estimate of losses sustained by the breaking up of his established business, there would seem to be no well founded objection. We all know that in many, if not all, professions and callings, years of effort, skill and toil are necessary to establish a profitable business, and that when established it is worth more than capital. Can it then be said, that a party deprived of it has no remedy, and can recover nothing for its loss, when produced by another? It has long been well recognized law, that when deprived of such business by slander, compensation for its loss may be recovered in this form of action. And why not for its loss by this more direct means? And of what does this loss consist, but the profits that would have been made had the act not been performed by appellants? And to measure such damages, the jury must have some basis for an estimate, and what more reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show, that by depression in trade, or other causes, they would have been less? Nor can we expect, that in actions of this character, the precise extent of the damages can be shown by demonstration. But by this means they can be ascertained with a reasonable degree of certainty. Nor do the views here expressed conflict with the case of *Green* v. *Williams*, 45 Ill. 206, as in that case the lessee had not entered upon the term: had not built up or established a business, and had not suffered such a loss. There was not in that case any basis upon which to determine whether there ever would be any profits, or upon which to estimate them. The case of *Cilley* v. *Hawkins*, 48 Ill. 308, proceeds upon the same principle.

The evidence as well as the instruction in reference to the profits and losses, were proper. That instruction being proper, the reverse was improper and was correctly refused. Nor is there any force in the objection, that appellee was not confined to the value of his lease from the time the power was withheld

until it was connected with the machinery, some five months afterwards. Appellee had sold out, his business was destroyed, and he was not bound to re-establish his business, when he had no assurance that it would be continued during the remainder of his term. Appellants had cut off the power under such circumstances as warranted him in believing that it was intended to deprive him of the use of the power, and he was not bound to suppose appellants would be more disposed to regard his rights in the future than they had been in the past. If appellants had repented and were then disposed to retract, they must not complain if appellee was unwilling to trust their future conduct, as by their own disregard of his rights in the past, they could not expect him to confide in them in the future. The instructions fairly presented the case to the jury, and the evidence sustains the verdict.

The judgment of the court below must be affirmed.

Judgment affirmed.

STURGES' SONS

v.

THE METROPOLITAN NATIONAL BANK OF NEW YORK for the use of FIELD, PALMER & LEITER

1. BILL OF EXCHANGE—*rights of the drawer as against a party holding the equitable title—who had notice of the fraud by which the bill was obtained.* D, the president of the Producers' Bank of Chicago, sold to F & Co a bill of exchange for $10,000, drawn by the bank, on the Corn Exchange Bank of New York. On the same day, D bought of S & Co, their draft for a like amount on the National Park Bank of New York, giving his check for the same, which was presented the next day for payment and dishonored, the Producers' Bank having failed. S & Co immediately stopped payment of their bill, by a telegram to that effect, addressed to both the Park and Corn Exchange Banks, and which was received

Syllabus. Statement of the case.

before S & Co's bill reached New York. F & Co, fearing that their bill purchased from D. would be dishonored, called upon him, when he informed them that he had that day telegraphed to the Corn Exchange Bank, to turn over S & Co's draft to the Metropolitan Bank, for the benefit of F & Co, and which the bank did, immediately upon the receipt of the bill, and then presented it to the Park Bank for payment, which was refused. *Held*, in an action by the Metropolitan Bank, for the use of F & Co, against S & Co, to recover on their bill,—

1st. That by the endorsement to the Metropolitan Bank, F & Co only acquired an equitable title to the bill.

2d. That this action having been brought by the endorsee of the bill, who was not a holder for value, for the use of F & Co, the proceedings upon their face show, only an equity in F & Co, and they having never acquired the legal title to the bill, could not maintain an action at law upon it.

3d. That F & Co, at the time the assignment of the bill was made to the bank for their use, having had notice of the fact that D fraudulently obtained it from S & Co, they thereby became affected by the same equities existing between the original parties to the bill.

2. SAME—*party receiving—bound to make inquiry.* The rule is, that where a party is about to receive a bill or note, if there are any such suspicious circumstances attending the transaction, or within the knowledge of the party so receiving it, as would induce a prudent man to inquire into the title of the holder, or the consideration of the paper, he shall be bound to make such inquiry, and if he neglects to do so, he stands affected by the same equities existing between the original parties. *Russell* v. *Hadduck*, 3 Gilm. 233.

3. SAME—*who will not be deemed to have taken in good faith.* And in such case, where the evidence showed that L, a partner in the firm of F & Co, attended exclusively to this transaction with D, on the part of the firm, and that he knew before these several drafts reached their destination, that D had deceived him concerning his pecuniary condition; that he had suspended payment; and was also knowing to the fact that rumors prevailed on the street, at that time, to the effect that the bill which D had purchased from S & Co had not been paid for, and that L, on hearing such rumors, inquired of D as to their truth, and D refused to answer: *Held*, that L, with knowledge of these facts, was bound to make inquiry concerning D's title to the bill, and having neglected to do so, F & Co were chargeable with notice of its infirmity.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

This was an action of assumpsit on a bill of exchange, instituted in the court below by the appellee, the Metropolitan

National Bank of New York, for the use of Field, Palmer & Leiter, against the appellants, Albert Sturges and Buckingham Sturges. The cause was tried before the court and a jury, and a verdict found for the plaintiff for the sum of $10,885, upon which judgment was rendered, to reverse which, the record is brought to this court by appeal.

The facts in this case fully appear in the opinion.

Messrs. WALKER & DEXTER and Mr. E. A. STORRS, for the appellants.

Messrs. BECKWITH, AYER & KALES, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

This is a contest between opposing equities, and the question is, which should prevail.

Appellants make several points. 1st. That the effect of the endorsement of the bill to the Metropolitan Bank for the use of appellees, was to vest in the bank the legal title to the paper, while the equitable title vested in appellees. 2d. The bank has the legal title, but it has no equities, having parted with no consideration for the bill, and therefore ought not to prevail against the equities of appellants. 3d. The bill sued on having been made payable in New York, and having been endorsed and transferred to appellee there, must be governed by the laws of New York, and under those laws a pre-existing indebtedness is not a valuable consideration. 4th. The bill was not actually endorsed or transferred to the bank until after Leiter, one of the firm, had heard that no consideration had been paid by the drawee of the bill; and this, they contend, was notice of their equity, and he took the transfer subject thereto.

Appellees make the points: 1st. That the transaction between the payee of the bill, Doolittle, and Leiter, occurred in this

State, and is governed by the laws of this State. 2d. The endorsee of a bill of exchange before its maturity, taking it as security for a pre-existing debt, and without any express agreement, is deemed a holder for a valuable consideration, and holds it free from any latent defenses on the part of the drawer. 3d. Field, Palmer & Leiter have all the rights in this suit which they would have had if the bill had been endorsed to them, and a suit been brought in their names. 4th. A party who has acquired an equitable title to commercial paper, without notice of any defense thereto, may afterwards, without notice, obtain the legal title, which vests in the holder by relation from the time he acquired his equitable title, and there is no pretense that Leiter had notice of any defense at the time he acquired his equitable title. 5th. The notice of the transfer to those having the nominal legal title, was equivalent to a delivery of the draft to appellees. 6th. A party taking a bill before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title, or the knowledge of circumstances which would excite suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title; that result can only be produced by bad faith on his part. 7th. There is no evidence of bad faith on the part of Leiter, when he took the draft, and the jury found that there were no circumstances attending the transfer requiring him to make inquiry, even if he was bound to do so.

The first proposition of appellants and the third of appellees, are to the same effect, which we have not considered, it being unnecessary, in the view we have taken of the case, and quite immaterial as to which law governs it, and the appellees have not argued the point. Field, Palmer & Leiter cannot contend they have anything more than an equitable title to this bill of exchange. The legal title, by the endorsement, was in the

Metropolitan Bank, and they alone could endorse it a second time. It being endorsed to the bank for the use of appellees, they became, thereby, the equitable owners.

Here the contest between the equities of these parties begins, and whose equity is the oldest and best?

It is insisted by appellees, that they acquired their title to the bill, without notice of any defense, and when they acquired the legal title, it related back to the time when they acquired their equitable title. We do not understand the case as showing, in any branch of it, that Field, Palmer & Leiter have ever acquired the legal title to this paper. The suit is brought by the bank, as holder of the legal title, which they are, and for the use of appellees, thus showing, upon the face of the proceedings, an equity, only, in them. If they had a right to the legal title, it could only be obtained by a resort to a court of equity.

This is the second point in appellees' brief, and we cannot perceive how the argument can apply to this case, as there can be no pretence that Field, Palmer & Leiter have anything more than an equitable title to the bill. The third point in the brief is to the same purport. There has been no acquiring of the legal title to this bill by Field, Palmer & Leiter, in the name of an agent or trustee, and the inquiry, therefore, as to whether that did not invest them with the same rights as if the bill had been acquired in their own names, does not seem to be pertinent.

The case of *Poirier* v. *Morris*, 2 Ellis and Blac. 88, (75 E. C. L. 89,) was a case where a bill was drawn in favor of Poirier Brothers, of Paris, for value received of Coates & Co., who had failed to pay Morris Prevort & Co, the drawers. It was drawn to pay a debt due Poirier Brothers, from Hovey, Williams & Co., of Boston. The defense was, that the bill was obtained by fraud, but the whole case was left to the court, upon the question, whether Poirier Brothers were holders for value, and so entitled to sue, and the court held they were.

Thus is produced a striking difference between that case, and this, as here, the Metropolitan Bank are not holders for value, never having paid anything for the bill, nor was it received by them in discharge of an antecedent indebtedness from Doolittle to them, or from any other person. This suit is brought by the endorsees of the bill, who are not the holders for value, for the use of Field, Palmer & Leiter. It cannot be, they could sue at law, for the endorsement gives them only an equity. The holders of the legal title must sue. *Moore* v. *Maples et al.*, 25 Ill. 341. The equities of Field, Palmer & Leiter arise alone from this endorsement, caused by the act of Doolittle, without the knowledge or consent of the beneficiaries, to meet a draft he had sold them for the same amount, which was dishonored.

Now, what are the equities of appellants? The bill was purchased of them by Doolittle, and not paid for, of which fact, it is claimed, Field, Palmer & Leiter had notice when the assignment was made by Doolittle to the bank for their use.

What is notice in such a case as this? The rule upon that subject is laid down with great clearness by this court, in the case of *Russell* v. *Hadduck*, 3 Gilm. 233, and from which there has been no substantial departure. When a party is about to receive a bill or note, if there be any such suspicious circumstances accompanying the transaction, or within the knowledge of the party, as would induce a prudent man to inquire into the title of the holder, or the consideration of the paper, he shall be bound to make such inquiry, or if he neglects to do so, he shall hold the bill or note subject to any equities which may exist between the previous parties to it. In other words, he shall act in good faith, and not wilfully remain ignorant, when it was his duty to inquire into the circumstances and know the facts.

Whatever rule different from this, other courts may have adopted, can have no influence upon this court. We are bound to take the rule as given, and to follow it as our safest and only guide. Other courts hold the same. *Morrison et al.* v. *The Gra-*

nite Bank, 8 Gray, 259; *Roth et al.* v. *Colvin et al.*, 32 Verm. 126; *Hale* v. *Hale*, 8 Conn. 337; *McKasson* v. *Stanberry*, 3 Ohio (new series), 158; *Bassett* v. *Avery*, 15 ib. 299, referring, at page 308, to *Williamson* v. *Brown*, 15 N. Y. 354.

A strong case upon the question of notice, entirely in conformity with the case in 3 Gilman, *supra*, is found in 5 Sanford's N. Y. 157, *Pringle* v. *Phillips*, in which the leading cases, both in this country and in England, are reviewed.

In opposition to these cases, appellees refer to *Goodman* v. *Simonds*, 20 Howard U. S. 343; *Goodman* v. *Harvey*, 4 Ad. & Ellis, 870 (31 Eng. C. L. 212), and *Murray* v. *Lardner*, 2 Wallace U. S. 110, as containing a different doctrine.

It is interesting to notice the changes made by the courts, of England especially, in their various rulings upon this question.

So early as 1781, Lord MANSFIELD ruled, in the case of *Peacock* v. *Rhodes*, Doug. 633, that a holder of a bill, coming fairly by it, has nothing to do with the transaction between the original parties.

In 1825, it was held by the Court of King's Bench, ABBOTT, afterwards Lord TENTERDEN, Chief Justice, in *Down* v. *Holling et al.*, 10 Eng. C. L. 602, (4 Barn. & Cress. 330,) that a loser of a check which a shop-keeper had taken in payment of goods purchased of him, might recover its value of the shop-keeper, and the jury were instructed to find for the plaintiff, if they thought the defendant had taken the check under circumstances which ought to have excited the suspicion of a prudent man.

Previous to this, before the same learned judge, the case of *Gill* v. *Corbett et al.*, was decided, 3 B. & C. 466, in which the doctrine was held, that a party taking a bill under circumstances which ought to have excited the suspicion of a prudent and careful man, could not recover on it against the acceptor. This was understood to be the law of that court until the case of *Cook* v. *Fadis*, 5 B & Ad. 909 (27 E. C. L. 234). This was an action by the endorsee against the drawer of an accommo-

dation bill, which had been fraudulently disposed of by the first endorsee, and afterwards discounted by the plaintiff, it was held, by Lord DENMAN, Chief Justice, that it was no defense that the plaintiff took the bill under circumstances which ought to have excited the suspicion of a prudent man that it had not been fairly obtained; the defendant must show the plaintiff was guilty of gross negligence.

Afterwards came the case of *Goodman* v. *Harvey*, 4 Ad. & Ellis, cited by appellees, *supra*, wherein Lord DENMAN said: "The question I offered to submit to the jury was, whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion, that gross negligence only would not be a sufficient answer when the party has given sufficient consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine. When the bill was passed to the plaintiff without any proof of bad faith in him, there is no objection to his title."

This rule was adopted by the Supreme Court of the United States, in *Goodman* v. *Simonds*, 20 Howard, and *Murray* v. *Lardner*, 2 Wallace, *supra*, but has never been recognized by this court—a close adherence being had to the rule in *Russell* v. *Hadduck*, *supra*. The latter rule is clearly recognized in *Farlin* v. *Lovejoy*, 29 Ill. 47, and is consonant with *Gill* v. *Corbitt*, *supra*, and the same is the doctrine of most of the American courts. *Ayer* v. *Hutchins*, 4 Mass. 470; *Wiggin* v. *Bush*, 12 Johns. (N. Y.) 305; *Brown* v. *Tabor*, 5 Wend. 566; *Cave* v. *Baldwin*, 12 Pick. 545; *Hall* v. *Hale*, 8 Conn. 336, citing *Gill* v. *Corbitt*; *Beltzhoover* v. *Blackstock*, 3 Watts, (Penn.) 20; *Hunt* v. *Sanford*, 6 Yerger (Tenn.) 387; *Nicholson* v. *Patton*, 13 Louisiana, 216; *Lapice* v. *Clifton*, 17 ib. 152, and many others to the same effect. The only American case to the contrary, decided by a State court, which we have been able to find, is *Matthew* v. *Puythess*, 4 Georgia, 237, that court

adopting Lord DENMAN, in *Raymond* v. *Harvey*, in preference to Lord TENTERDEN in *Gill* v. *Corbitt*.

Lord DENMAN's rule, as explained by him in *Uther* v. *Rich*, 10 Ad. & El. 784 (37 E. C. L. 232), is much too rigid and exacting, and will lead to less caution in dealing with negotiable paper than should be desired. In that case, it was held, that it was not sufficient to allege, that the plaintiff was not a *bona fide* holder of the bill, that *mala fides* must be distinctly averred. Appellee's fourth point is predicated on this ruling.

Which is the soundest and safest rule, is not now a subject of inquiry for us, one having been established for our guidance in 3 Gilman, *supra*, with which we are satisfied.

Now, did appellees have notice of the infirmity of this bill? Not directly, as is admitted, but it is insisted, that the position of appellees was such, acting by and through Mr. Leiter, and the circumstances surrounding the transaction at the time, were of such a nature as to put a careful and prudent man on inquiry as to their reality, the principal of which is, that he had good reason to know Doolittle had not paid Sturges for this bill.

We have examined the testimony carefully, and it strikes us as establishing knowledge, on the part of Leiter, that Doolittle had not paid for this bill.

Suppose, instead of transferring the bill, while *in transitu*, to the Metropolitan Bank, when he and Leiter had the street interview on the 19th, Doolittle had taken the bill out of his pocket and delivered it to Leiter, could he recover from the drawers? No one will pretend he could, for the suit against the drawers would have to be brought in the name of Doolittle, the payee, for the use of Field, Palmer & Leiter, when the want of consideration could be pleaded by the drawers. Is this case different, for the reason the bill was assigned by Doolittle to the Corn Exchange Bank, and by that bank to the Metropolitan Bank, for the use of Field, Palmer & Leiter?

Field, Palmer & Leiter have but an equity in either case, and in both cases subservient to the older equity of Sturges' Sons, the drawers of the bill.

But in view of the rule in *Russell* v. *Haddock*, we think the evidence shows most clearly, that Leiter had notice, constructive at least, of a want of honest title in Doolittle to this bill—that he had not paid for it, and that it was fraudulently obtained of the drawers. He had every reason to know and believe it. He knew, on the 19th, that Doolittle had suspended payment—that he had deceived him in regard to his pecuniary condition—that it was rumored on the street that the bill was not paid for, and from Doolittle's refusal to answer the question put to him directly on the point, Leiter must have been well satisfied of that fact. Here, then, are two parties claiming equities, one of them at the time of the transaction, from personal considerations, and not as a strictly business matter, purchases exchange from a person then about to be, and soon after became, his brother-in-law. He had taken no collaterals, and in a day or two after, the bank on which the bill of exchange was drawn by its president, closed its doors, and the bill never was paid. Meeting with the drawer, in the street, then knowing the bank had suspended—had actually closed its doors,—he inquired of him about the bill he had bought of him, if it was all right. The drawer said it was, that he had provided for it, and showed him a dispatch or blank of his mails in transit, assuring him that it contained more than sufficient to cover the draft. He saw the dispatch, and he at once telegraphed to his partner in New York, and to the president of the Metropolitan Bank, asking them to see that the order in the dispatch was duly carried out. This was about 2 o'clock in the afternoon. At 4 o'clock of the same afternoon, he again met with Doolittle, where, is not stated, and when asked if he learned at that time what was in transit to New York, he answers evasively, by saying he did not ascertain definitely—that Doolittle said there was more than sufficient

to pay his draft—it was exchange sent by mail—is not positive that Doolittle told him any of this exchange was Sturges' exchange—that no intimation was made that this exchange was not paid for. Had at this time, and in the morning, doubts about the draft he bought, and when he met Doolittle at 2 o'clock, he was assured by him, that he had been taken care of, and showed the dispatch, which was: "Pass what funds you have on hand, and remittances you receive, over to the Metropolitan National Bank, for the use and benefit of Field, Palmer & Leiter, Chicago." At 4 o'clock, p. m., of this same day, Doolittle told Leiter one of Sturges' drafts was in that mail, that carried funds enough to pay Leiter's draft. It is not pretended it was any other than this $10,000 draft now in suit, and when asked if that draft had been paid for by him, Doolittle declined answering, and there were "all sorts of rumors on the street," and Leiter says he did not know what to believe or disbelieve. If, then, Leiter wanted to know the truth about this, how easy was it for him to walk a few hundred yards to Sturges' office, and there ascertain it definitely. Sturges swears, though his office for business closed at 3 o'clock, it was actually open for all other purposes until 5. In 10 minutes, then, after this interview, Leiter could have learned the fact, that the draft had not been paid for by Doolittle, and that Sturges had taken prompt measures, before that time, to have the payment of it stopped. It is incredible, amid these rumors on the street, and Doolittle's refusal to say that the draft was paid for, that Leiter should not have every reason to believe it had not been paid for. All the circumstances of the transaction imposed upon Leiter the duty of going at once to Sturges, and ascertain Doolittle's title to this bill, and if the consideration was paid. He could so easily have obtained this knowledge, and neglecting so to do, he must be adjuged to hold the bill subject to the equities existing between appellants and Doolittle, because Leiter seems, wilfully, to have avoided a source of information which it was his duty to apply to, and

to which, it seems to us, the ordinary sentiments of honesty would impel him.

Besides, Field, Palmer & Leiter, nor either of them, paid any thing for this bill. It is true, Doolittle got $10,000 of their money for his own bill, but it was not the understanding or agreement that he should put up collaterals, or give any security whatever for his bill.

Leaving, then, the rule of law aside, who, of these parties, is most justly entitled to this bill? Can there be hesitation in the answer? Will not every man say, on these facts, Sturges should not pay the bill? We think the law and the facts sustain them in their claim.

The principle of the doctrine of constructive notice is, that where a person is about to perform an act, by which he has reason to believe the rights of a third party may be affected, an inquiry into the facts is a moral duty, and diligence an act of justice. Hence, he proceeds at his peril, when he omits to inquire, and is chargeable with a knowledge of all the facts that by a proper inquiry he might have ascertained. This neglect is followed by all the consequences of bad faith, and he loses the protection to which his ignorance, had it not proceeded from neglect, would have entitled him.

This was the language of the Court of Appeals of New York, in *Pringle* v. *Phillips*, 5 Sandf. 157. It is in perfect harmony with the case cited in 3 Gilman, and is entitled to our full assent, and more to be preferred than Lord DENMAN'S rule.

Since this decision was made, we have seen and considered the case of *Whistler* v. *Forster*, 108 E. C. L. 246, which, in its leading features, is like this case. The plea was, that the bill was obtained from the defendant by one Griffiths, by means of fraud, and that it was endorsed to the plaintiff after he had notice of the fraud. The instrument was a negotiable instrument, which had been fraudulently obtained from the defendant by Griffiths, and had been handed over to the plaintiff in part

satisfaction of a debt of a larger amount, but Griffiths, at the time he handed over the bill, the plaintiff, omitted to endorse it.

The court held that Griffiths having defrauded the defendant of the bill, he could pass no right by merely handing the bill over to another—that according to the law merchant, the title to a negotiable instrument passes by endorsement and delivery—that the plaintiff's title under the equitable assignment was to be rendered valid by endorsement, but at the time he obtained the endorsement, he had notice that the bill had been fraudulently obtained by Griffiths from defendant, and Griffiths had no right to make the endorsement. Assuming, therefore, the court say, there may be conflicting equities between the plaintiff and defendant, the right should prevail according to the rule of law, and that the plaintiff had no title as transferee of the bill, at all. It was further held, until the endorsement was made, the plaintiff was merely in the position of the assignee of an ordinary chose in action, and has no better right than his assignor, and when he does so, he is affected by fraud which he knew of before the endorsement.

The names being changed, the case is the same as this, for Leiter had notice, while the bill was in transit, by mail, to the Corn Exchange Bank, from whom the plaintiff received it, that the drawee had paid no consideration for it. It is not pretended the plaintiff paid any consideration.

We think the equities of appellants far outweigh those of the beneficiaries under this assignment, and that the bill in the hands of appellees, is subject to their equities. The finding was against the evidence, and the instructions of the court. Field, Palmer & Leiter never united their equities with the legal title, and they are subordinate to those of appellants.

The judgment must be reversed and the cause remanded.

Judgment reversed.

CHARLES J. DURHAM

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

BASTARDY—*of proof that the complaining witness was unmarried.* In a prosecution for bastardy, the complaining witness spoke of herself as an unmarried woman at the time of the trial, and of the defendant as having "kept company" with her for a year and a half: *Held*, that the jury might properly understand this as meaning that the defendant had been paying his addresses to her with a view to marriage, thus implying she was an unmarried woman.

APPEAL from the Circuit Court of Kankakee county; the Hon. CHARLES H. WOOD, Judge, presiding.

The opinion states the case.

Mr. MASON B. LOOMIS, for the appellant.

Mr. WILLIAM T. AMENT, State's Attorney, and Mr. WILLIAM H. RICHARDSON, for the people.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was a prosecution for bastardy, and the only question now made by the appellant is upon the sufficiency of the testimony. He insists it does not sufficiently appear that the complaining witness was an unmarried woman. The evidence, however, was such as to justify the jury in finding that fact. She spoke of herself as an unmarried woman at the time of the trial, and of the defendant as having "kept company" with her for a year and a half, by which phrase the jury would properly understand the witness as meaning, that the defendant had been paying his addresses to her with

a view to marriage, thus implying she was an unmarried woman.

There is no reason for setting aside the verdict.

Judgment affirmed.

Illinois Central Railroad Company

v.

Ezekiel Phillips.

1. Railroad companies—*care and diligence required of—for the safety of persons not under their care or control.* The law requires of railroad companies, in exercising their franchises, so to use them as not to endanger the security of persons, so far as the employment of human sagacity and foresight can reasonably anticipate and prevent; and to that end, they must provide good and safe machinery, constructed of proper materials and free from defects, so far as known and well recognized tests can determine, and employ skillful and experienced servants in the use of such machinery, and exercise care and vigilance in its examination, to see that it is kept in proper repair and in a safe condition, and when these requirements have been complied with, they can not be held liable for accidents occurring, by which an injury is sustained by a person not under their control or care.

2. Same—*liability of.* While these corporations can not be held liable for injuries that may result from using their franchises, where skill and experience are unable to foresee and avoid them, nor for the acts of persons not in their employment, and over whom they have no control, they will be held responsible for injuries that result from a failure to exercise judgment and skill in the selection of material, construction of their machinery, and in its use upon their roads.

3. Negligence—*explosion of a steam boiler—prima facie evidence of.* In an action against a railroad company, for injuries alleged to have been sustained by the plaintiff, while in the depot of the defendants, from the explosion of the boiler of one of defendants' engines: *Held*, that the mere fact that the boiler exploded, was *prima facie* evidence of negligence, to overcome which, it must be shown, that the materials used in its construction were of the kind usually

employed, and that it had been subjected to, and withstood the usual tests, and was used with judgment and skill, by persons of experience.

Appeal from the Superior Court of Chicago.

The opinion states the case.

Mr. John N. Jewett, for the appellants.

Messrs. Hurd, Booth & Kreamer, for the appellee.

Mr. Justice Walker delivered the opinion of the Court:

This was an action on the case, brought in the court below, by appellee, against appellants, to recover damages for injuries alleged to have been sustained by him in consequence of the explosion of the boiler of one of appellants' engines, in the Union Depot at Chicago. The declaration contains two counts, in both of which it is averred, that the explosion was occasioned by reason that the engine and boiler were "old, weak, worn out, insecure, and wholly unfit for use," and that the company did not, by their servants, employ due and proper care in its management and use. In both counts, appellee is stated to have been a bystander, accidentally in the vicinity when the injury occurred.

It appears that the engine was one usually employed in the freight service on the road of the company. In October, 1867, it was withdrawn from that service, in consequence of an injury to its machinery,—but it does not appear that it was to the boiler,—and was placed in the shops of the company, and was repaired. Witnesses testify, that before leaving the shop, on the 19th of October, 1867, it was tested under a pressure of 140 pounds of steam to the square inch, without detecting any defect. It was employed from that time until the day the boiler exploded, in the freight business about the city. On

that day it was put in the place of another engine, and was run to Hyde Park and back. After its return, and while standing on the track in the depot, after the passengers were discharged, and while waiting till the track could become clear, so that it could be backed out, it seems, without any warning, the boiler exploded, rending it in many fragments, some thrown to a considerable distance. It appears that appellee was at the time walking along the platform inside of the depot, and within a few feet of the engine. He was thrown down by the explosion, receiving a bruise on his head, was drenched with dirty water, and was confused by the concussion. It is claimed that symptoms of paralysis have resulted from the injury thus received. The jury rendered a verdict for $7,000 against appellants, on the trial. A motion for a new trial was entered, but was overruled by the court, and judgment rendered on the verdict, and this appeal is prosecuted for its reversal.

The court below was asked, but refused, to give for appellants, their twelfth instruction in the series. It is this:

"If the jury believe, from the evidence, that within a reasonable time before the explosion of the boiler in question, the defendants made a careful and thorough examination of the engine and boiler, by skillful and qualified mechanics in that branch of business, and that the same was then in sound and good condition, and so continued up to the time of explosion, so far as could be discovered; that there was, at the time of the explosion, a proper quantity of water in the boiler, and only an ordinary amount of steam, and that said engine was under the management of a careful and skillful engineer, and that the explosion was from causes which could not have been ascertained by any known and recognized means, then the injury, if any, to the plaintiff, must be borne by him, as one of that class of injuries for which the law affords no redress, and the jury should find for the defendants."

This instruction presents the question of extent of care and diligence the law requires of railroad companies, in exercising their franchises, for the safety of the community at large, not under their care or control as passengers. When their charters were granted, and they accepted them, they assumed the performance of a variety of duties to the public, among which was one undertaking to use their franchises in such a manner as not to endanger the security of persons, so far as the employment of human sagacity and foresight could reasonably anticipate and prevent. They are required to employ experienced, efficient, skillful and prudent agents, servants and artizans. They must provide and use properly constructed machinery, well constructed, by competent and skillful workmen, when manufactured by the company, and from good materials. They must employ competent, skillful, prudent and sober men to use such machinery, and in doing so, they must be careful and vigilant in its examination, to see that it is in proper repair and in a safe condition.

On the other hand, they can not be held to answer for latent defects in materials employed in the construction of their machinery, which the usual and well recognized tests of science and art afford for the purpose but fail to detect. Nor are they liable for accidents occurring by which injury ensues, when skill and experience are not able to foresee and avoid them; nor for the acts of persons not in their employment, and over whom they have no control, or when they have exercised judgment and skill in selecting the material, manufacturing their machinery, and in its use upon their roads, or in selecting machinery manufactured by others.

But when they are employing so dangerous an element as steam for their gain and profit, a proper regard for human life and safety does require that a high degree of care and skill should be employed. From the very nature of its use, large numbers of persons are necessarily exposed to the danger, whether upon their trains or going to or from their depots,

either as passengers, on business with the company, with persons at those places, or are taken there to meet friends, or otherwise. By the exercise of their franchises, they invite large concourses of people to their depots, which, on the arrival and departure of trains, are open and free to the public. And to permit negligence or a want of skill, the use of illy constructed, worn out, or defective machinery, to the danger of persons thus brought together, would be a failure of duty, and a reckless disregard for the safety of community.

While, however, this degree of diligence and care is required, these bodies are not, nor does the law require that they should be, responsible for the safety of persons thus in and about their depots, at all hazards. When they have, so far as the employment of reasonable skill and experience enables them, employed experienced, skillful and prudent servants in the use of their machinery; have selected good and safe machinery, so far as known and well recognized tests can determine, constructed of proper material, free from defects, so far as like tests will disclose, neither reason nor justice requires that they should be held liable for injuries that may result from using their franchises.

It may be that as high a degree of diligence may not be required of them to secure the safety of persons not passengers or having business with the company as for those who are, but, if not, it would be difficult to define the line of separation. It follows, from the rule that we have here announced, that the twelfth of appellants' instructions should have been given. It announces these principles, in a clear, concise and very distinct manner, and by its refusal, the jury were not in possession of all the law governing the case. They may have been, and probably were, misled, in finding their verdict, by its refusal, and in this the court erred.

It is urged, that the court below erred in refusing to give appellants' fifth instruction, which is this:

"The mere fact that the boiler of the engine in question exploded, causing injury to the plaintiff, is not, in this case, and under the relations existing at that time, between the plaintiff and the defendants, as set forth in the declaration, even *prima facie* evidence of negligence, or want of due and proper care on the part of the defendants, either in respect to the condition or management of said engine; and the jury are not authorized to find the existence of such negligence, or want of due and proper care, from the mere fact of such explosion and injury."

Circumstantial evidence depends almost alone upon human observation and experience for its value. It is, in fact, the knowledge of the relation of things and acts to each other, or the knowledge of the motives which prompt acts, and the consequences of acts or causes. When, from observation, we have seen uniform results follow particular acts, we infer that such acts are the cause, and the results are their consequences. Observation teaches, that certain passions, emotions or feelings, usually lead to the performance of particular acts, among all men, and hence, we conclude that, if the passion existed and was excited to a particular degree, a certain act was the result, unless restrained by superior and controling circumstances. So with the natural laws governing inanimate matter. We know it has certain properties, and we also know that these laws are overcome by counter laws or forces. We know that it is a law of matter to cohere and remain united, in various degrees of compactness; depending upon the extent of its cohering power, be that what it may. The particles of iron cohere one with another, in different degrees, depending upon its freedom from impurities, its fineness and other properties. Scientific tests have determined the quality that is best adapted to the several branches of the mechanical arts, and to be employed in the various branches of manufactures. Selections

are made from the different varieties, for various uses, because of their different properties.

Experience in the manufacture and use of iron, for the various useful purposes, has taught that one variety is well suited to one purpose, while another variety is to another. Hence, iron of peculiar qualities has been found best adapted to resist the force of steam. And the skilled and experienced manufacturer selects plates made from iron possessing those qualities, for that reason, when he constructs a steam boiler, if he desires safety and durability. He selects that quality in which there is the greatest tenacity of the particles, and hence, the greatest power of resistance to the force of steam. Some iron possesses this quality in a high degree, while other in a less degree, and some have it greatly improved by the mixture of the ores of different qualities. This being understood by the manufacturer of steam boilers and those engaged in repairing them, they usually select the particular quality suited to the purpose, which is known by the place of its manufacture.

Again, the manufacturer has tests, which are recognized by the scientific world as well as the practical manufacturer, by which to detect latent defects, if they exist, thus securing safety and durability. And every day's experience teaches, that where the proper quality of iron has been selected under the usual tests, with reasonable care by skillful and experienced persons, they are safe in their use for practical purposes. Knowing this, when an explosion has occurred, it is natural to conclude that there has been negligence in selecting, testing, or putting the materials together, when constructed into a boiler, or that it has been negligently used, by subjecting it to too high a degree of pressure by steam. It would, therefore, be improper to say that an explosion is not *prima facie* evidence of negligence. But when it is shown that the iron used in the construction of such a boiler is of the kind usually employed, has been subjected to and stood the usual tests, and has been used by experienced persons with prudence

and skill, this *prima facie* evidence is overcome, and the inference must be drawn that the explosion occurred from some latent defect, not detected by the usual and proper tests. And of all of these questions the jury must be the judges. It then follows, that the court did not err in refusing to give this instruction. But for the error in refusing the twelfth instruction the judgment must be reversed and the cause remanded.

Judgment reversed.

THE CITY OF CHICAGO

v.

JOHN MARTIN *et ux.*

1. DAMAGES—*exemplary—when will not be allowed in actions against municipal corporations.* In an action on the case, against a municipal corporation, for a personal injury sustained by reason of the mere negligence of the corporation to repair a defect in one of its streets, punitive damages will not be allowed, it appearing that such street was not in the business part of the city, and but little used by the public.

2. And it is difficult to conceive of a case, against a municipal corporation, which would justify the allowance of exemplary damages.

3. MUNICIPAL CORPORATION—*have a discretion as to the time when repairs in streets not much in use—shall be made.* Municipal corporations have a discretion as to the time when repairs, in streets not much used by the public, and not in the business part of the city, shall be made; and if a personal injury is sustained by a person, by reason of a defect in any such street, the corporation can not be held guilty of gross negligence, in an action for such injury, and subjected to exemplary damages, for the mere failure to make necessary repairs.

4. DAMAGES—*vindictive will not be allowed—where aggression and malice are absent.* The rule is, that in order to justify the allowance of exemplary or vindictive damages, either gross fraud, malice or oppression must appear; and in

the absence of these elements, the damages can not exceed, and must be confined strictly to compensation for the injury sustained.

5. FORMER DECISIONS. The cases of *McNamara* v. *King*, 2 Gilm. 432; *Hosley* v. *Brooks*, 20 Ill. 115; *Bull* v. *Griswold*, 19 ib. 631; *Ously* v. *Hardin*, 23 ib. 403; *Foote* v. *Nichols*, 28 ib. 486; *Hawk* v. *Ridgway*, 33 ib. 473; *Best* v. *Allen*, 30 ib. 30; *Bull* v. *Bruce*, 21 ib. 161, and *Toledo, Peoria & Warsaw Railway Co.* v. *Arnold*, 43 ib. 419, cited in support of the principles enunciated.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

This was an action on the case, brought by the appellees, in the court below, against the City of Chicago, the appellant, to recover damages for a personal injury alleged to have been sustained by the appellee, Bridget Martin, by reason of a defect in one of the public streets of the city. The cause was tried before the court and a jury, and a verdict and judgment rendered for the plaintiff, for $1,000, to reverse which, the record is brought to this court by appeal.

Mr. S. A. IRVIN, for the appellant.

Mr. GEORGE A. PARKER, for the appellees.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

There was, probably, some degree of negligence in the city to permit this defect in the culvert to remain so long, but, that thereby, it was guilty of gross negligence, amounting to wilful injury, can not be admitted. This work was on a street in the city, but not in the business part of it,—rather in the outskirts, which localities have never been supposed to demand, and certainly do not receive, the same attention as more populous and fashionable localities. And it is right and just that it should be so. The city authorities of Chicago should take more care of Lake or State street, than they should of streets

in the remotest additions to the city, which, though portions of the city, may not be populous or business portions, and therefore not demanding the same care. Such was the street in question, and the defects in which, when the accident occurred, were visible to every one, and where the injury received was of a very slight character. To instruct the jury, under such circumstances, as the court did, in the fifth instruction for the plaintiff, was erroneous. That instruction told the jury, if they found for the plaintiff, they might give exemplary or punitive damages, in addition to the damages for pain and suffering, if they believe, from the evidence, the city was guilty of gross and wilful negligence in not keeping this street in reasonable repair at the point where the injury was received.

This instruction, doubtless, produced the large verdict of one thousand dollars, for a sprained wrist and a slight hernia.

And how could the city be charged with a wilful injury in this case, for gross negligence amounts to that? There is no evidence in the record to sustain such a charge. The neglect to repair this street, was not, under the circumstances, gross or wilful. It was an unimportant street, not demanding or entitled to the special care of the city, other more important matters demanding their care and the expenditure of the money drawn from labor by taxation.

That, in a proper case, a jury may give exemplary or punitive damages, as they are called, will be admitted. If a trespass is committed, wantonly or maliciously, upon real property, it has been held, vindictive damages may be given, *Pickens* v. *Towle*, 43 N. H. 220, but whether they should give them or not, is a question which should be submitted, with proper instructions, to the jury. The mere pecuniary injury received, is not, in such cases, the full measure of damages. The intention with which the act was done is to be regarded. In *Merest* v. *Harvey*, 1 E. C. Law, 230, which was for trespass, for breaking and entering the plaintiff's close, treading down his

grass and hunting for game, it appeared, the defendant refused to leave, when notified, and used insulting language to the plaintiff. It was held a verdict for five hundred pounds was not excessive. GIBBS, Chief Justice, said, "I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages?" So, in trespass *de bonis asportatis*, it was held, in *Treat* v. *Barlon*, 7 Conn. 279, that the jury were not bound by the mere pecuniary loss sustained by the plaintiff, but may award damages for the malice and insult attending a trespass. Generally, where gross fraud, malice or oppression appears, the jury are not bound to adhere to a strict line of compensation, but may, in the shape of damages, impose a punishment on the defendant, and make an example to the community. These are the elements of vindictive actions, so called, in which juries are allowed to give such damages as shall not only compensate the plaintiff, but operate as a punishment to the defendant, and tend to deter him and others from the commission of similar enormities. *Grable* v. *Margrave*, 3 Scam. 373; *McNamara* v. *King*, 2 Gilm. 432; *Hosley* v. *Brooks*, 20 Ill. 115; *Bull* v. *Griswold*, 19 ib. 631; *Ously* v. *Hardin*, 23 ib. 403; *Foote* v. *Nichols*, 28 ib. 486; *Hawk* v. *Ridgway*, 33 ib. 473; *Best* v. *Allen*, 30 ib. 30; *Ball* v. *Bruce*, 21 ib. 161.

In theory, damages are given as compensation for the injury and the allowance of punitive damages, is a departure from the rule, which once obtained both in England and in this country, yet it has become, by repeated decisions, a settled principle in the law, and there is no corrective but the legislature.

This court is not disposed to extend this principle, and embrace within it the mere negligence of a municipal corporation, who must necessarily have a discretion as to the time when they will repair a defect in a street not much used, and not in a business part of the city. We do not think this case

falls within the class where exemplary damages can be given for gross negligence merely. To justify such damages, the act must be wilful, or the negligence must amount to a reckless disregard of the safety of persons or property. We have found some cases expressing a different view, but in the doctrine of which we are not inclined to concur. One is the case of *Whipple* v. *Walpole*, 10 N. H. 130, where it was held, in an action for damages arising from a defect in a bridge which the defendants were bound to repair, exemplary damages might be given, in case the defendants had been guilty of gross negligence. The others were cases against the *N. O., Jackson & Great Northern R. R. Co.* v. *Hurst*, 36 Miss. 660, and *the same* v. *Bailey*, 40 ib. 395; *Vicksburg & Jackson R. R. Co.* v. *Patton*, 31 ib. 156; *Bowen* v. *Lane*, 3 Metc. (Ky.) 311, the appellant being the owner of a railroad.

The case in 36 Miss. *supra*, shows most clearly, if correctly decided, there is no limit to which a jury may not go in awarding exemplary damages. There the plaintiff was carried four hundred yards beyond a station, and the conductor, refusing to return, put him off, so that he had to walk back with his valise to the station; the jury awarded him four thousand five hundred dollars, which the court refused to set aside, saying, "the law, in such cases, furnished no legal measurement, save the discretion of the jury!"

We prefer the doctrine of the Supreme Court of Missouri, in *Kennedy* v. *North Mo. R. R. Co.*, 36 Mo. 351, that, to authorize the giving of exemplary or vindictive damages, either malice, violence, oppression or wanton recklessness must mingle in the controversy. The act complained of must partake of a criminal or wanton nature, else the amount sought to be recovered must be confined to compensation.

This court has never sanctioned the doctrine contained in this instruction, and would be very unwilling to follow those courts which do. The cases referred to by appellees' counsel, as decided by this court, do not bear upon this point at all. They

merely say, that if a wrong instruction has been given, it does not follow the judgment will be reversed, if, from the whole record, it is manifest substantial justice has been done. The farthest this court has gone in this direction, was in the case of *Peoria Bridge Association* v. *Loomis*, 20 Ill. 236, not cited by appellees' counsel, where we said, *arguendo*, that a jury might give exemplary damages in cases of wilful negligence or malice, if the proof exhibits such a state of case, and that, to constitute wilful negligence, the act done or omitted, must be the result of intention, and that mere neglect could not, ordinarily, be ranked as wilfulness, and then the court proceed to lay down the rule of damages for personal injuries resulting from the negligence of others. We say, they must be measured by the loss of time during the cure, and expense incurred in respect of it; the pain and suffering undergone by the plaintiff, and any permanent injury, especially when it causes a disability for further exertion, and consequent pecuniary loss. *Hunt* v. *Hoyt*, 20 Ill. 544, is to the same effect.

It is scarcely conceivable that a case could be made against a municipal corporation, justifying punitive damages, and it is of such we are treating. The city is not a spoliator, and should not be visited by vindictive damages. Where aggression and malice are absent, the damages can not exceed compensation for the injury done—in other words, they can not be punitive. *Toledo, Peoria & Warsaw Railway Co.* v. *Arnold*, 43 Ill. 419.

For the error in giving the fifth instruction, the judgment is reversed and the cause remanded for further proceedings, consistent with this opinion.

Judgment reversed.

DENNIS McCARTHY

v.

WILLIAM MOONEY.

NEW TRIAL—*verdict against the evidence.* Where the parties testify on the trial of a cause, and the evidence is conflicting, it is for the jury to determine which party to believe.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

This was an action of assumpsit, brought by Mooney against McCarthy, for work and labor done. A trial was had before the court and a jury, resulting in a verdict and judgment for the plaintiff for $210. The defendant thereupon took this appeal, and asks a reversal of the judgment, upon the ground that the verdict was against the evidence.

Mr. O. B. SANSUM, for the appellant.

Mr. A. C. STORY, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This is an action for work and labor. It has already been before this court upon a judgment for the plaintiff, and remanded for a second trial, upon the ground that the evidence was insufficient. Since then it has been tried again, and the parties have themselves been sworn, under the recent statute, and the jury rendered another verdict for the plaintiff. As the record is now presented, we cannot say the verdict is not sustained by the evidence. It was for the jury to determine which party to believe.

There was no error in the giving or refusing instructions.

Judgment affirmed.

CHARLES DAEGLING

v.

THOMAS E. GILMORE.

1. NEGLIGENCE—*liability of contractor—from negligence of his superior.* A contractor employed to do the brick work upon a building, under the plan and direction of an architect, as an agent of the owner, can not be held liable for the acts either of the architect or the owner.

2. SAME—*liability of the contractor.* In such case, the contractor, working under the plans and direction of the architect, only undertakes that *his* work shall be skillful and workmanlike, and can only be held liable for its sufficiency.

3. SAME—*contractor not liable for architect's negligence.* And if the contractor performs his work with skill and in a workmanlike manner, under the direction of the architect, and in accordance with his plan, he can not be held answerable in damages, for an accident which occurs from the falling of the building, where such accident was the result of a defect in the plan of the architect, not known to the contractor.

APPEAL from the Superior Court of Chicago.

The opinion states the case.

Messrs. HERVEY, ANTHONY & GALT, for the appellant.

Messrs. GARRISON & BLANCHARD, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action on the case, brought by appellee, in the Superior Court of Chicago, against appellant, who was employed by one Schwartz, to erect the walls of a brick building, near the premises of appellee. There was a contract to perform the wood work, and another to do the gas work and plumbing. It was all to be done according to plans and specifications furnished by one Bauer, an architect, and who

was, under the agreement of the parties, the superintendent of the work. The building, while in the process of erection, and before it was roofed, was blown down, and fell upon appellee's house and crushed it, destroying his household property, killing his wife and child, and injuring himself and niece, and he claims that he lost a considerable sum in money and government bonds. For these injuries he claims the right to recover damages in this action against appellant. A trial was had in the court below, and the jury found a verdict in his favor for $3,031. A motion for a new trial was entered, which the court overruled and rendered judgment on the verdict. The case is brought to this court on appeal, and a reversal is asked on the grounds of a misdirection of the jury by the court, and because the verdict was against the evidence and the instructions which were given.

It is urged, that appellant was not liable for inherent defects in the plan of the building furnished by the architect. In this, as in all other actions, a recovery can not be had except for some neglect or violation of duty imposed by the law. As a general rule, one person is not responsible for the acts or omissions of another. It is, however, true, that there are certain relations, which, when they exist between parties, render one person liable for the acts or defaults of others, as in case of master and servant, and principal and agent, and in some other cases, where the doctrine of *respondeat superior* is applied. But in this case none of these relations appear to have existed. Appellant was the contractor to perform the work, under the direction of the architect as the agent of the owner of the lot; and hence, appellant can not, by any known rule of law, be rendered liable for the acts of either the architect or the owner.

Appellant had no right or power to control the acts of either, and to hold him liable for them would be to reverse the rule and require the inferior to answer for the acts of the superior,

or his principal—to render the servant liable for the acts of his master, and the agent for those of his principal.

A builder, working under the plan and direction of an architect, does not hold himself out as a scientific architect. He only holds himself out as a skillful and competent workman, capable of fully carrying into effect the plans of the architect. He neither directly nor indirectly endorses or insures the sufficiency of the architect's plans. He does not devise them, endorse them, or undertake for their sufficiency. He only undertakes that his work shall be skillful and workmanlike. And if he fails in this, he must answer in damages for the loss that is thus produced. If, then, this building fell, as the result of negligence, incompetency or want of skill in the manner in which the work was performed by appellant, he would be liable for the damages which ensued. But if he performed his part of the work with skill, and in a workmanlike manner, under the direction of the architect, and on his plan, and that plan was defective, he would not be liable. He, in the performance of his part of the work, must be responsible for the skill and fidelity of the workmen he employs in its execution, as well as all persons under his control, but not for the acts of those under whom he acts, or for others acting independently of him. Hence, if it appeared that the negligent or unskillful manner of performing the carpenter's work, by the contractor, was the cause of the fall of the building, appellant would not be liable for the damages it produced. A case might occur, where a plan was so defective that a person unskilled in the principles of architecture would know that it was unsafe, in which case a contractor, working under such a plan, furnished by an architect, would be liable; but ordinarily such is not the case, unless it could be shown that the contractor knew the plan was defective, as in such a case he has no right, knowingly to endanger community.

Several of the instructions given for appellee, contravene the views here expressed, and they, no doubt, misled the jury

in arriving at their verdict, and they were, to that extent, erroneous, and the judgment of the court below must be reversed and the cause remanded for a new trial.

Judgment reversed.

NICHOLAS SCHAEFFER

v.

JAMES L. KIRK *et al.*

BAILMENT—*a factor for hire—of his duty in respect to insurance.* The doctrine is well settled, that a factor for hire is not obliged to effect insurance on the property consigned to him, without some authority, express or implied, from his principal.

WRIT OF ERROR to the Superior Court of Chicago.

The opinion states the case.

Messrs. DENT & BLACK, for the plaintiff in error.

Messrs. ASAY & LAWRENCE, for the defendants in error.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

In March, 1867, towards the close of that month, plaintiff in error, a large manufacturer of soap and candles, in St. Louis, sent to the defendants, who were manufacturers and dealers in the same articles, at Chicago, 200 boxes of star candles, to be sold by the defendants for the plaintiff. Defendants had insured their own goods in the previous January, but effected

no insurance on the defendants' goods after they received them.

Up to the 17th of May, 1867, the defendants had sold of this consignment about 40 boxes, when on that day, the remainder, together with defendants' goods, were destroyed by fire.

This action was brought to recover the value of these candles, the plaintiff insisting it was the duty of the defendants to have insured the goods, as it was the usage of commission merchants in Chicago, to effect insurance on goods consigned to them.

The declaration does not aver that defendants were commission merchants, nor is it proved they were. On the contrary, the defendant Kirk, testified, that his house had never, before or since, received for sale any goods on commission—that was the first time. They advanced the freight on the candles, and stored them in the front part of their building, where they were destroyed.

Not being commission merchants, the defendants were not amenable to the alleged custom. The position they occupied was that of factors or agents, mere depositories for hire, who, though bound to ordinary diligence, are under no obligation to procure insurance on the thing bailed, without some authority, express or implied, from their employer. Story on Bailment, sec. 456, referring to Jones on Bailment, 102.

No express authority to insure was pretended, nor can any be implied, from the course of business of these parties—this being the first and only consignment passing from the plaintiff to the defendants.

The case of *Keane* v. *Brandon*, 12 La. An. R. 20, to which plaintiff has referred, does not support the position he takes, viz.: that because the defendants kept their own goods insured, they should have caused his to be insured in like manner. In that case, no point was decided in conflict with the doctrine cited from Story, but the court said, an agent who is instructed to insure, cannot take the risk upon himself

as an insurer, without the previous consent of his principal. He cannot contract with himself, and if he could, the rule is as consonant with public policy as with a sound morality, that he should not be permitted to do so. He cannot, therefore, recover for the premiums for insurance which he has charged, for there has been no contract of insurance; but in case of loss, he would not the less have been bound to indemnify his principal, not as an insurer, but as an agent who had failed to comply with his instructions. p. 23.

The case of the *Ætna Ins. Co.* v. *Jackson*, 16 B. Monroe, 242, decides only, that an agent or consignee, having the property of his principal in his possession, and responsible for it, may, and especially if he have an interest in it, though it be only for his commissions, insure it in his own name, and in case of loss, recover its full value, holding all beyond his own interest in trust for the owner of the property. We think the doctrine in Story has not been departed from, and that no case can be found, holding that a factor is obliged to effect insurance on property consigned to him, without instructions from his principal to that effect.

The views of the superior court were in harmony with those herein expressed, and the judgment must be affirmed.

Judgment affirmed.

WILLIAM WILDER

v.

ROBERT L. GREENLEE *et al.*

NEW TRIAL—*newly discovered evidence.* Although a verdict returned in a case where the testimony was conflicting, will not usually be disturbed, merely because the appellate court inclines to a different view from that taken by the court

below, yet, when it is shown on the motion for a new trial that there was newly discovered evidence, not cumulative in regard to the particular point to which it relates, and the importance of which could not have been foreseen, and such newly discovered evidence strengthens the conviction of the court that justice has not been done, a new trial will be granted.

APPEAL from the Superior Court of Chicago; the Hon. S. B. GOOKINS presiding as Judge, by agreement of parties.

This was an action of replevin, brought by William Wilder against Robert L. Greenlee and others, to recover a portable steam engine, The defendants pleaded property in James Baxter. The question presented was, whether the engine in controversy was the property of Baxter or of the plaintiff.

The cause was tried before the court, without a jury, the issue turning upon the fact, whether the engine replevied was the same engine which had been taken from the possession of the plaintiff's bailee by fraudulent means, and sold to Baxter. The court found the issues for the defendants. A motion for a new trial was entered, upon the alleged ground that the finding was against the evidence, and upon an affidavit disclosing newly discovered evidence. A new trial was refused, and judgment entered upon the finding. The plaintiff thereupon took this appeal.

Mr. W. C. GOUDY and Mr. THOMAS S. MCCLELLAND, for the appellant.

Messrs. HIGGINS, SWETT & QUIGG, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The only question in this case is, whether the engine which was replevied was the same engine which had been fraudulently obtained from the possession of the plaintiff's bailee, under the false pretext that the person thus obtaining it had bought

it from the plaintiff. While the evidence upon this point is contradictory, it has led us to a different conclusion from that reached by the learned counsel who, by consent of parties, tried this case in the superior court. As, however, it is not the practice of this court to reverse a judgment where the evidence is contradictory, merely because our own examination inclines us to a different view of it from that taken by the court below, we should probably refrain from doing so in this case, if the newly discovered evidence presented in the affidavits submitted on the motion for a new trial did not strengthen our conviction that the ends of justice require a further examination of this case.

As there is to be another trial, we forbear from any discussion of the evidence, only remarking that the case is a peculiar one, and the witnesses on one side or the other have clearly sworn to what is not true, and the newly discovered testimony is not cumulative in regard to the particular point to which it relates, nor could its importance have been foreseen by the plaintiff.

A careful examination of the entire record, has left us with a firm conviction that there should be an opportunity given for a further investigation.

The judgment is reversed and the cause remanded.

Judgment reversed.

SOPHRENIUS M. HICKEY

v.

JOHN FORRISTAL *et al.*

1. WRITS—*when directed to a constable—and executed by a city marshal.* Under a *capias ad respondendum*, issued by a justice of the peace of La Salle county,

and addressed, "to any constable of said city," one P was arrested by K, as city marshal of La Salle. H entered himself as special bail, and afterwards, judgment was rendered against P, and execution issued thereon against H, as provided by statute; whereupon, he filed a bill in chancery to enjoin the levy of the execution, on the ground that, under the writ, the marshal had no authority to make the arrest: *Held*, that H was entitled to the relief sought. The writ being addressed *only* to a constable, no authority was conferred upon the marshal to execute it, and all his acts under it were void.

2. CHANCERY PRACTICE—*that a party has a remedy at law—objection—can not be made for the first time in this court.* The objection, that a complainant has a complete remedy at law, comes too late, when made for the first time in this court.

APPEAL from the Circuit Court of La Salle county; the Hon. MADISON E. HOLLISTER, Judge, presiding.

The facts in this case are sufficiently stated in the opinion.

Mr. D. L. HOUGH, for the appellant.

Messrs. BULL & FOLLETT, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

One Parkhurst was arrested on a *capias ad respondendum*, issued by Forristal, a justice of the peace, and executed by Keys, as city marshal of La Salle. Hickey, appellant herein, entered himself as special bail, and an execution was afterwards issued against him under the statute, upon a judgment rendered against Parkhurst. He then filed a bill in chancery to enjoin the levy of the execution, upon the ground that the city marshal had no power to make the arrest under the capias, as it was addressed "to any constable of said city." The court below dismissed the bill, and the complainant brings the record here.

In our opinion the complainant was entitled to his decree. There can be no question but that the arrest was illegal. The

writ was issued by Forristal in the capacity of a justice of the peace, and was addressed only to a constable, and the city marshal had no more authority to make an arrest under it than would the sheriff or any private person.

But it is said the complainant has a remedy at law. Without stopping to inquire whether the remedy in this case would be complete at law, it is sufficient to say, that question should have been made in the court below. As it was not made, and as the subject matter of the bill is not foreign to the jurisdiction of a court of equity, the complainant should have had a decree.

The decree is reversed and the cause remanded.

Decree reversed.

HENRY SCHWABACHER *et al.*

v.

LEWIS WELLS.

NEW TRIAL—*verdict against the evidence.* A new trial was awarded in this case, on the ground that the verdict was for a larger amount than the evidence warranted.

APPEAL from the Circuit Court of Peoria county; the Hon. SABIN D. PUTERBAUGH, Judge, presiding.

This was an action originally brought before a justice of the peace, and appealed to the circuit court of Peoria county. It appears that the appellee, Wells, traded to the appellants a lot of ready-made clothing and dry goods, for a horse, buggy, narness, and a lot of whiskey and cigars. He claimed that the horse was warranted sound, and it proved unsound, and

that the whiskey which he received, was not the same he selected and bought, and this action was brought to recover damages therefor. On the trial in the court below, a verdict and judgment were rendered for the plaintiff, for $196.75.

Messrs. O'BRIEN & WELLS, for the appellants.

Messrs. GRIFFITH & LEE and Mr. HENRY GROVE, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

The proof settles this fact, that plaintiff, Wells, was to keep the horse if he would not answer his purpose, and defendants would allow him $100 in the trade. It was proved by the blacksmith who shod the horse just before the trade, that when defendants got the horse he was not stiff, but was stiff when he shod him, and the proof is full that he was not fit for livery purposes, for which plaintiff desired him.

The jury have given credit to the testimony of indifferent witnesses, that the whiskey was inferior—not worth $3.10 a gallon, or anything like it. It was returned to the defendants as not up to the sample, and they had it when the suit was commenced. There were 22 gallons of it, which at $3.10 per gallon, would amount to $68.20.

The verdict, then, should have been, premium for retaining the horse, $100; whiskey not delivered, 22 gallons, at $3.10 per gallon, $68.20; making in all $168.20. The plaintiff recovered $196.75, being more, by $28.55, than the evidence showed him entitled to.

A new trial should have been allowed. We cannot correct the error here, and must reverse the judgment and remand the cause, that a new *venire* may issue.

Judgment reversed.

Syllabus. Brief for the appellants.

PHŒNIX INSURANCE CO. v. FAVORITE et al.

ÆTNA INSURANCE CO. v. THE SAME.

NORTH AMERICAN INSURANCE CO. v. THE SAME.

1. INSURANCE—*what property is embraced in the policy.* The owners of a packing establishment obtained a policy which covered "cattle and hogs and the product of the same, and salt, cooperage, boxes, and articles used in packing, in their stone and frame packing establishment, sheds and yards adjoining, their own or held by them in trust or on commission, or sold but not delivered": *Held*, that a quantity of coal in the yard, which was shown to be an article necessary to be used in carrying on the packing business, and the quantity on hand reasonable for the amount of business done in the establishment, was covered by the policy.

2. Nor did the use of the words in another policy, "articles used *for* packing," instead of "articles used *in* packing," affect the construction to be given to the instrument, in that regard.

3. Also, a quantity of barrels and tierces held by the assured on storage, were covered by the clause which embraced articles "held by them in trust or on commission," the term "trust" not having been used in that connection in any technical sense, but as applying to ordinary bailments.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

The opinion states the case.

Messrs. SLEEPER & WHITON, for the appellants, contended that coal used in carrying on the business of a packing establishment, was not covered by a policy upon "articles used in packing," citing *Hood* v. *Insurance Co.*, 1 Kernan, 532; *Mason* v. *Insurance Co.*, 12 Gill & J. 469; *Watchorn* v. *Langford*, 3 Camp. N. P. 422; *Liddle* v. *Insurance Co.*, 4 Bosw. 179; *Holmes* v. *Insurance Co.*, 10 Metc. 211; *Kent* v. *Insurance Co.*,

26 Ind. 294; *Washington Insurance Co.* v. *Merchant's Insurance Co.*, 5 Ohio, N. S. 450; *Wall* v. *Insurance Co.*, 3 Selden, 370; *Jennings* v. *Insurance Co.*, 2 Denio, 75.

Mr. I. N. STILES, for the appellees, on the same question, cited *Moadinger* v. *Mechanic's Fire Insurance Co.*, 2 Hall, 493; *Peoria Mar. and Fire Insurance Co.* v. *Lewis*, 18 Ill. 561; *Home Insurance Co.* v. *Favorite et al.*, 46 Ill. 263.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

These are three different actions, brought by the appellees, upon three several policies of insurance, issued to them by the different appellants. The policies covered "cattle and hogs and the product of the same, and salt, cooperage, boxes, and articles used in packing, in their stone and frame packing establishment, sheds and yards adjoining, on South Branch Chicago river, Chicago, Ills., their own or held by them in trust or on commission, or sold but not delivered."

The only difference between the policies, is that two of them have the phrase, "articles used for packing," instead of "articles used in packing," and counsel have called our attention to this difference, but we deem it wholly unsubstantial. The question in the case is, whether 200 tons of coal in the yard, bought for the purpose of carrying on the business of appellees, and a quantity of barrels and tierces held by them on storage, were covered by the foregoing clause of the policy.

In a case between these appellees and the Home Insurance Company, 46 Ill. 263, in which the policy contained this same clause, we held it was a question for the jury, to be determined upon the evidence, whether the coal in the yard was an article necessary to be used in packing, and if they should find it was so necessary, it would be covered by the policy. The circuit court, on the trial of these cases, submitted this question to

the jury, and they found for the plaintiff. On an examination of the evidence we think it sustains the verdict.

The phrase of the policy, "articles used in packing," clearly does not refer merely to the articles that may be employed in the single act of stowing the beef or pork in barrels. Its reasonable construction, as is evident from the context, is, that the parties designed to insure those articles in their "packing establishment, sheds and yards adjoining," which were used by them, not merely in the single act of packing, but in carrying on their packing business. It is shown, by the evidence, that this business, in Chicago, includes the slaughtering of the cattle and hogs, of rendering the tallow and lard, and the preservation of the meats in barrels and tierces. That the policy was issued with reference to this mode of transacting the packing business, and was designed to apply thereto, is evident from the fact that the clause of the policy now under consideration begins by enumerating "cattle and hogs," as the first objects of insurance, and then "the product of the same," and the property is identified as being in their "stone and frame packing establishment, sheds and yards adjoining." Certainly the local agents of the appellants, when they issued these policies, did not expect the cattle and hogs to be packed alive. They must have expected them to be slaughtered, and the tallow and lard rendered, and must have known that this is a part of the business of packing beef and pork in Chicago, as shown by the evidence. They were taking a risk on the personal property in a large "packing establishment," and they must be supposed to have known, and it is evident from the policy they did know, what was the nature of that business, and that it included the slaughtering of the cattle and hogs named in the policy, and the rendering of their tallow and lard. In construing this policy we must look for the intention of the parties, and we can not doubt, that in using the words, "articles used for packing," they designed to employ a phrase which should cover such articles used for the

business of the packing establishment as had not been specifically enumerated in the policy.

It is shown, by the evidence, that coal is necessary in such an establishment for various purposes, but chiefly for rendering the tallow and lard, and that the quantity on hand was reasonable for the amount of business done in the establishment.

A question is now, for the first time, made in regard to a steam engine which counsel for appellants infer was in the building, and the presence of which, it is urged, would avoid the policy. This question is not presented by the record, for it does not appear, unless by a very remote inference, that a steam engine was there. There is nothing in the evidence to justify the presumption.

The barrels of Cole and Sullivan were covered by the policy, which expressly applies to articles held in trust or on commission. We do not understand the term "trust" to be used in any technical sense, but to apply to ordinary bailments.

The judgment must be affirmed.

Judgment affirmed.

JOHN N. SHULER

v.

EDWARD F. PULSIFER *et al.*

SENDING PROCESS *to a foreign county—where a contract is made.* A commission merchant doing business in Chicago, in Cook county, called upon a party in La Salle county, and requested him to consign grain to the former. The party in La Salle county did not reply definitely at the time, but subsequently consigned a shipment of grain to the commission merchant, at Chicago, advising him of the fact by letter, and in the same letter requested him to deposit a certain sum to

the credit of the shipper's banker, which was done, but the sum so deposited exceeded the proceeds of the grain shipped, and to recover such excess the commission merchant brought suit in Cook county, against the shipper, and sent the summons to La Salle county for service: *Held*, that the contract out of which the cause of action arose, was made in La Salle county, and not in Cook county, and therefore the summons could not be sent to La Salle county to be served.

APPEAL from the Superior Court of Chicago.

The opinion states the case.

Messrs. WATERMAN & BANE, for the appellant.

Messrs. PETERS & SHARLING, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, commenced in the Superior Court of Chicago, and the summons sent to and served in La Salle county. Defendant below filed a plea to the jurisdiction of the court, denying that the cause of action arose, or that the contract was actually made, in Cook county. A replication was filed, averring that the contract was actually made in Cook county, and not otherwise, as alleged in the plea A trial was subsequently had by the court, a jury having been dispensed with by consent of the parties. The court found the issues for the plaintiffs, and assessed their damages at $433.82, and rendered judgment for that sum. The cause is brought to this court by appeal, and we are asked to reverse the judgment.

On the trial, it appeared, that in the month of July, 1865, E F. Pulsifer, one of the plaintiffs, called upon defendant, in the city of Ottawa, in La Salle county, and solicited him to consign grain to plaintiff's firm, who were engaged in the grain commission business, Pulsifer, at the same time, offering to do defendant's business as low as he was having it done

elsewhere. That defendant said to him that, if he changed commission houses in Chicago, he would, or might, ship grain to the house of Pulsifer. That about the 24th of October following, defendant shipped from Ottawa about 5,800 bushels of corn to plaintiffs, to sell as commission merchants.

At the time he made this shipment of grain, he wrote appellees, apprising them of the fact, and directing them, on its receipt, to deposit in the Merchants' Loan & Trust Company $2,500, to the credit of Eames, Allen & Co. That the deposit was made as requested. The corn was shipped to and sold in New York, and after deducting expenses and charges, it lacked $433.82 of equaling the advance made on the cargo. And it was to recover this deficit that appellees brought this suit.

There is no pretense that appellant resides, or was served with process, in Cook county, but it is contended that the proof shows, the contract was actually made in Cook county. The first section of the act of 1861 (Sess. Laws, 180), declares that it shall not be lawful for a plaintiff to sue any defendant out of the county where the latter shall reside, or may be found, except in cases where there are several defendants, when suit may be brought in any county in which either defendant may reside, and process may then be sent to any county in which the others may reside.

The third section limits the operation of the first, and declares that its provisions shall not apply to any case where the plaintiff is resident of, and the contract is actually made in, the county in which the action is brought.

Whether both things must concur, the residence of the defendant in, and the contract must be "actually made in the county where suit is brought," before process can be sent to another county, is not necessary to be determined in this case, as appellant was neither a resident of Cook county, nor was the contract "actually made" in that county. The evidence shows that the proposition for appellant to consign

grain to appellees was made in LaSalle county, and by shipping the corn and writing the letter from that county, he accepted it at that place. Each and every act which he did in making the contract, was performed in LaSalle county, and we are at a loss to perceive how it can be supposed he did any act in Cook county, connected with or out of which the agreement arose. So far as we can see from the evidence, he may never have been in Cook county, nor does the evidence show that any agent of his did anything connected with the contract in Cook county. On the contrary, one of appellees called upon him in LaSalle county, and there made the proposition to do appellant's commission business, and he accepted the proposition in that county.

Then it is clear, that the contract was actually made in La Salle, and not in Cook, county. Nor is it an answer to say, the law implied a promise to pay this money in Cook county, because the money was deposited there on the order of appellant. Where the law implies a contract, it cannot be said to be a contract actually made by the parties at a place, unless the parties are present and perform the acts out of which the law implies the contract.

These views are in accordance with and based upon the case of *Mahoney* v. *Davis*, 44 Ill. 288. This case is like that in all of its essential facts, and must, therefore, be controlled by it. The court below erred in finding the issues for appellees, and in rendering judgment in their favor, which is reversed and the cause remanded.

Judgment reversed.

Syllabus.

JOHN D. PAHLMAN

v.

EMILY A. KING, Administratrix of the Estate of J. B. KING, Deceased.

1. ADMINISTRATRIX—*in actions against—for breach of a parol contract made with the intestate—what plaintiff must prove—demand necessary.* In an action against an administratrix to recover for the breach of a contract alleged to have been made with the intestate, in his life-time, by which the latter was to deliver to the plaintiff a certain quantity of coal at a specified price, and where the contract alleged to have been made, so far as plaintiff was concerned, rested entirely in parol, it is necessary for the plaintiff to show not only a readiness and willingness to perform his part of the contract, but a demand on the defendant for the property contracted to be delivered.

2. CONTRACTS—*for the delivery of personal property—in actions for non-delivery—what must be shown.* In an action upon a contract for the non-delivery of the articles contracted for, where the obligations to pay and deliver are concurrent, in order to recover, the plaintiff must aver and prove his readiness and willingness to perform his part of the contract.

3. SAME—*slight proof sufficient.* And in such case, slight evidence of the fact will be sufficient, but some proof must be given. *Hungate* v. *Rankin*, 20 Ill. 641, and *Hough* v. *Rawson*, 17 ib. 588.

4. ERROR—*will not always reverse.* This court will not award a new trial, merely on the ground that an improper instruction was given, where it appears, from the record, that substantial justice has been done.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

The opinion states the case.

Mr. J. S. PAGE, for the appellant.

Messrs. WAITE & CLARKE, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

The record in this case shows a claim presented by John D. Pahlman, before the county court of Cook county, against the estate of John B. King, deceased, represented by his widow, Emily A. King, administratrix, to recover of the estate a very large sum of money, for the breach of a contract alleged to have been made by King, in his life-time, to deliver Pahlman, in the fall and winter of 1864, three thousand tons of coal, at the price of four dollars and ninety cents per ton. The court disallowed the claim, and Pahlman appealed to the circuit court, where, on trial by a jury, a verdict was found for the administratrix, and the claim again disallowed.

To reverse this judgment the claimant brings the record here by appeal, assigning as error, a modification of an instruction asked by the plaintiff and in giving certain instructions for the defendant.

The instruction modified by the court was as follows:

"The jury are instructed, if they find that King contracted with the plaintiff, in the summer of 1864, to deliver to him in Chicago 3,000 tons of coal during the then next fall and winter for a stipulated price, and that the coal was not delivered according to said contract, in that case the plaintiff was not required to demand of King or his representatives a performance of the contract before bringing an action for its breach."

The court added, "but, in order that the plaintiff should recover damages for the breach of the contract, it must appear, from the evidence, that the plaintiff was ready and willing, and offered to perform the contract on his part within the time limited by the contract, if any time was limited, and if not, then within a reasonable time."

It was proved, in the cause, that King died October 2, 1864; that the widow and administratrix, caused an account to be made out against the plaintiff in 1865, which, she testified, she

presented to him in the spring of 1866, which plaintiff looked at, and said it was right; that he then said nothing about a coal contract, and when she made out the account she had never heard of any claim for coal on contract. The evidence of a contract is furnished alone by letters which King wrote, one of June 30, 1864, addressed to the Braceville Coal Company, and the other of July 25, of the same year, addressed to Wm. H. Odell, who was the real and only company. These letters, by a fair construction of them, coupled with the business King was doing, his advertisements thereof, his "bill heads," and the large sign at his place of business, of all which it is impossible that Pahlman should not have had full knowledge, leave the inference almost irresistible, that it was in the contemplation of these parties, that this coal was to come from the Braceville Coal Company, namely, from Odell, and that he had told plaintiff, his engagements were such with the railroad company that he could not undertake to deliver the specified number of tons, but only such surplus as might be left over after supplying the railroad company. The arrangement was made, if at all, in the summer of 1864, and, during the time of the existence of the contract, or soon after, if a contract was made, this kind of coal was worth, on the track, from seven dollars to nine and a half dollars per ton. There is no proof that plaintiff ever demanded the coal of King, in his life-time, though on the account presented he was charged with four tons of coal at alleged contract price, as having been had by him in August and September, 1864. We think, in the absence of authority on the point, none being necessary, that, under this state of fact, the modification by the court was quite proper. The claim was not presented to the county court until in March, 1866, in which plaintiff states he was ready at all times to receive and pay for the coal, and had "demanded the same."

If there was a contract, it was to have been consummated by delivery, by the close of the winter of 1864–5, which would

have been March 20, 1865. Now, as the plaintiff alleged in his declaration, the statement of his claim filed with the county court, being for this purpose to be considered equivalent to a formal declaration, that he was ready and willing, and offered to perform his contract, and had demanded the coal, that he should have made some proof of these facts, not, perhaps, that he had the money in hand to pay down, but some evidence of readiness and willingness. Slight evidence of this would be sufficient, but some evidence must be given. *Hungate* v. *Rankin*, 20 Ill. 641; *Hough* v. *Rawson*, 17 ib. 588. In the character in which the defendant was acting, it was quite important the plaintiff should prove a demand upon her, since, as the contract, so far as plaintiff was concerned, rested entirely in parol, she could not be supposed to have any knowledge of it, so that she might fulfill it.

We think, under the mass of proof in this case, that it is incredible that the plaintiff understood that King was binding himself to the performance of this contract, it being most clearly in the contemplation of both parties that the plaintiff should have only such surplus as should remain after supplying the demand of the railroad company.

Reverse the case, and suppose coal had fallen to a price far below $4.90 per ton, would King, under the facts here shown, have had a right of action against the plaintiff? We can not believe it.

It is objected, that the defendant's instructions were erroneous. Technically, they were, but in view of the surrounding circumstances, of the close relations which subsisted between the plaintiff and the deceased, and the proof in the cause that the plaintiff never understood he had made any contract which would bind the deceased, personally, nor any which would bind the supposed principal, the Braceville Coal Company, but was content to take his chances to receive Braceville coal at this low price, through the agency of the deceased,

should there be any surplus, we will not reverse for that cause.

On an inspection of the whole record, we think substantial justice has been done in the case, and in view of this, we would not reverse the judgment for mere misdirection of the court, on a point of no real importance in the case.

The judgment must be affirmed.

Judgment affirmed.

MARVIN A. LAWRENCE *et al.*

v.

H. C. STEADMAN *et al.*

1. ATTACHMENT—*in proceedings by—against partners.* In a proceeding by attachment, against H and S, the affidavit alleged two grounds for suing out the writ—1st, That H was about to depart the State, with the intent to remove his effects, to the injury of his creditors, and 2d, That H and S were about fraudulently to sell and assign their property and effects, so as to hinder and delay their creditors. The defendants filed separate pleas traversing the affidavit: *Held*, that, the proof having failed to sustain the cause alleged against S, a recovery could not be had against both defendants, by proving the first allegation against H.

2. SAME—*only those who are brought by the affidavit within the provisions of the statute—can be proceeded against.* In proceedings by attachment, the affidavit must bring those against whom the writ issues within the provisions of the act, and only those who are thus brought within its provisions can be proceeded against.

3. PRACTICE AT LAW—*in attachment proceedings—suit abates—where a plea in abatement is sustained.* The practice in this State is, that where a plea in abatement, traversing the affidavit, is sustained on the trial, to abate the suit.

4. And in this case, the plaintiff having wholly failed to prove any grounds for the attachment against both defendants, the plea in abatement should be sustained, and the suit abated. S, then, being out of court, no judgment could

be rendered against both, without which, the property of H could not be sold under the attachment.

APPEAL from the Superior Court of Chicago.

The opinion states the case.

Messrs. BARKER & TULEY, for the appellants.

Messrs. SPAFFORD & MCDAID, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a proceeding under the attachment act, to recover for moneys alleged to have been advanced by appellants to appellees to purchase grain and other produce to be shipped to appellants. Lawrence, on behalf of his firm, filed his affidavit, which alleges that Hagerman was about to depart from the State, with the intention of removing his effects, to the injury of appellants and other creditors, and that appellees were about fraudulently to sell and assign their property and effects, so as to hinder and delay their creditors in collecting their debts. Upon this affidavit a writ of attachment was issued and levied upon property. A declaration was filed in assumpsit containing the appropriate common counts.

Appellees appeared and severally filed pleas. Steadman, in his plea, denies that he was about fraudulently to sell and assign the property of Steadman & Hagerman as alleged; and Hagerman, by his plea, denies that he was about to depart this State with the intention of removing his property, or that he was about to sell his own property, or that of the firm of Steadman & Hagerman, as alleged in the affidavit. Issues were joined on these pleas, a trial was had before the court and a jury, and a verdict was rendered in favor of the defendants. A motion for a new trial was entered but overruled by

the court, and a judgment was rendered on the verdict, and this appeal is prosecuted for its reversal.

It is insisted that the court trying the cause erred in refusing to give appellants' first instruction, which is this:

"If the jury believe, from the evidence, that the allegations of the plaintiff's affidavit in regard to Hagerman's departing from this State with the intent alleged is true, they will find for the plaintiffs on that issue, and fix the plaintiffs' damages at the amount of claim proven."

It will be observed that the affidavit alleged two grounds for suing out the attachment. One was, that Hagerman was about to remove from the State, with the intent to have his effects so removed, to the injury of his creditors. This is one specific, distinct ground for an attachment against Hagerman alone, that in no manner could affect his partner, Steadman. The other ground is, that Steadman & Hagerman were about fraudulently to sell and assign their property and effects, so as to hinder and delay their creditors. This ground was against Hagerman and his partner, but not against him separately, as was the other. Under the first ground, an attachment might issue against Hagerman's property and effects, but surely not against Steadman's. Had an attachment issued against Hagerman, on that allegation, his individual property, and his interest in the firm property, might, no doubt, have been attached; but no one would contend that Steadman's individual property, or his interest in the firm property, could have been seized and held under such a writ. It only made a case for issuing a writ of attachment against Hagerman.

By the 6th section of the attachment law it is provided, that in all cases where two or more persons are jointly indebted, either as partners or otherwise, and an affidavit, as required by the 1st section of the act, is filed, so as to bring one or more of such joint debtors within its provisions, and amenable

to the process of attachment, then the writ of attachment shall issue against the property and effects of such as are so brought within the provisions of the attachment law; and the officer shall be also directed, in the writ, to summons all such joint debtors as may be named in the affidavit filed in the case, to answer to the action as in other cases of attachment. If, then, the allegations in reference to Hagerman, had been relied upon alone to sustain an attachment, the writ should have only required his property to be seized, but should have commanded Steadman to appear and answer to the action. It would, under that clause in the affidavit, have been manifest error to have issued a writ against the property of Steadman, or his interest in the firm property. But the affidavit goes farther, and makes out another and distinct ground for an attachment against both partners, under the amendatory act of the 13th of February, 1865, p. 104. The affidavit, so far as it relates to both appellees, conforms to the third clause of the 1st section of the amendatory act.

Inasmuch, however, as there was no evidence upon which to base a verdict against Steadman, the question is presented, whether appellants had a right to recover a judgment for the debt against both, by proving the cause of attachment against Hagerman, and have his interest in the property sold. The allegation is, that he is about to remove his property from the State,—not that he intended to remove the firm property from the State.

It has been the uniform practice in this State, where a plea in abatement, traversing the allegations of the affidavit for the writ, is sustained on the trial, to abate the suit. In this case, the plea in abatement of the writ against both partners, was found for them, and, under the evidence, no other verdict could have been sustained. And on this finding, then, the writ against the partners should be abated, and the action terminated as to them, and they were entitled to a judgment abating the action. Steadman was, then, out of court, and,

that being the case, no judgment could be rendered against the firm, and without such a judgment, the property of Hagerman could not be sold on the attachment. The plaintiffs had sued upon a joint indebtedness, and had sued out the two attachments, and failing to recover a judgment against the defendants, both writs must fall, and no order for a sale of the property could be made.

Had appellees pursued the 6th section of the attachment act, a different result might have been attained. Had the affidavit against Hagerman alone been filed, describing the claim as a firm debt, and a writ of attachment had issued against him, and Steadman had been summoned, Hagerman could have pleaded in abatement of the attachment, and Steadman in bar of the action, and had the issues been found against them, then a judgment would have been rendered against them for a recovery of the debt, and an order for the sale of the property of Hagerman which had been seized under the attachment. But without both issues formed in this case had been found for appellees they could not succeed.

Had an ordinary action been brought against appellees, and a writ of attachment, in aid of the suit, been sued out against Hagerman, the case would then have stood in the same attitude as if the proceeding had conformed to the requirements of the 6th section of the attachment act. In either case, a judgment must be recovered on the claim upon which suit is brought, before the property attached can be ordered to be sold. And in this case, failing to prove any grounds for the attachment against the firm, the plea in abatement was compelled to be sustained, and the instruction informed the jury that it could not matter if that plea in abatement was sustained, and they should, nevertheless, if they believed that Hagerman had failed to sustain his plea in abatement, proceed to assess the damages proved against the firm. It will be perceived, from what has been said, that this instruction was

wrong and calculated to mislead the jury, and was, therefore, properly refused.

No error is perceived in this record, and the judgment of the court below must be affirmed.

Judgment affirmed.

BENJAMIN T. O. HUBBARD *et al.*

v.

WILLIAM F. GEORGE.

CONTRACTS—*performance.* G made a contract with H & B, by the terms of which, G sold to them, at a specified price, a quantity of wheat by sample, to be delivered at a future time, and to be of the same quality of the sample. Upon the delivery of the first load, H inspected it, and remarked that "it would do," but on the arrival of the other loads, they were examined by both H and B, and refused, as not being equal to the sample, and thereupon G sold the grain to other parties: *Held*, in an action against H & B, to recover for the non-performance of the contract, that the declaration by H, upon the examination of the first load, that "it would do," could only be regarded as an admission that the wheat filled the sample to the extent of such load; that they were not thereby concluded as to the whole purchase, and had the right to reject the other loads, if they were not equal to the sample.

APPEAL from the Circuit Court of Warren county; the Hon. ARTHUR A. SMITH, Judge, presiding.

This was an action in assumpsit, originally brought in the Warren County Court, by the appellee against the appellants, to recover damages for an alleged non-performance of their contract. It appears that these parties entered into a contract, by the terms of which, appellee sold to appellants between two and three hundred bushels of wheat by sample, which

was to be delivered at a future time, and of the same quality as the sample. One load only of the wheat was received by appellants, and the balance was rejected by them, as not up to the sample, whereupon appellee sold the wheat to other parties. A change of venue was taken to the Warren Circuit Court, where a trial was had before a jury, and a verdict and judgment rendered for the plaintiff for $80. To reverse this judgment, the record is brought to this court by appeal.

Messrs. STUART & PHELPS, for the appellants.

Mr. J. M. KIRKPATRICK, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

That the property in this wheat was not transferred to the appellants, seems clear, from the fact, that the plaintiff sold and delivered it to other parties.

On the point that defendants were bound by the declaration of Hubbard, after the first load of wheat was weighed, that "it would do," and that such declaration was an admission that the wheat filled the sample, cannot be so regarded, for, at the time he said so, there had been but one wagon-load examined, and to that, only, could it apply. When he returned with his partner, Belden, who examined the other loads, they were found not to be up to the sample, and were rejected. This was the defendants' right. Instructions 9, 11, 12, given for the plaintiff, were, therefore, not proper. As the series of instructions must be regarded, we are inclined to think, the defect in instruction 9 was covered by others which were given, but that cannot be alleged of 11 and 12. Instruction 11 is as follows:

"If the jury believe, from the evidence, that a contract was made and entered into, as alleged in the declaration, between

the plaintiff and defendants, and that within the time and at the place agreed upon, the said plaintiff was ready and willing, and then and there tendered to the said defendants a quantity of wheat, and that defendant, Hubbard, after an examination of said wheat, said it would do, or words to that effect, and accepted the same, and afterwards refused to pay for the same, or to furnish a place for plaintiff to unload, then the jury will find for the plaintiff, although they should further find that the wheat was not as good in quality as the sample by which it was sold."

The proof is clear, but one load of wheat was examined when the admission was made. On the examination of the other loads, they were rejected, as not equal to the sample.

For these reasons, the 12th instruction was objectionable:

"The jury are instructed, that although they may believe, from the evidence, that the wheat in controversy was sold by sample, and that the wheat delivered or tendered by plaintiff was not as good as sample shown, they must still find for the plaintiff, provided they further find, from the evidence, that the defendants, or one of them, after an examination of the wheat tendered or delivered, accepted the same and said it would do, or used words to that effect."

The purchasers were not concluded by the hasty examination of one load.

For the reasons noticed, the judgment must be reversed and the cause remanded.

Judgment reversed.

Syllabus.

CHARLES B. WARE

v.

ALBERT W. GILMORE.

1. ERROR—*will not always reverse.* This court will not disturb the judgment of the court below, for an error committed which was afterwards corrected, no injury having resulted to the party complaining.

2. It is only in cases where errors are committed to the prejudice of the party seeking a reversal, that this court will interfere.

3. CONTRACTS—*performance.* W made a written agreement with G, whereby he acknowledged himself indebted to G for the sum of $10,026.25, the purchase price of 229 head of cattle, and it was agreed, that W should ship to Chicago, without delay, 109 head, and sell them for the highest price, and after deducting expenses, apply the balance upon the debt to the extent of $6,000, and secure the balance of the purchase money. The cattle thus shipped were to be under the control of one H, subject to W's direction. Under this agreement, 107 head were shipped, but W refused to allow H to sell them at the price offered, on their arrival. The market declined, and on the third day, G, through one M, purchased them from H for himself, and after paying expenses, gave to H G's receipt for the balance of the proceeds on the sale. The next day, W, learning of the transaction, replevied the cattle, and placed them in the hands of A, who sold them for his use: *Held*, in an action of covenant brought by G against W, he having failed to pay over to G the proceeds of such sale, or secure the debt, that G was entitled to recover. That it was immaterial whether the act of G, in procuring the sale to be made to M, was proper or not, as such act in no wise released W from the performance of his covenant. Having sold the cattle, he was bound to pay over the proceeds to G, and secure the balance of the debt, according to his agreement.

4. INSTRUCTIONS—*need not be repeated.* It is not error to refuse an instruction which, in substance, is but a mere repetition of instructions which were given. Instructions need not be repeated.

5. SAME—*modification.* Nor is it error to refuse to modify an instruction, when, by modification, the same principle already given would be repeated.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

The opinion states the case.

Messrs. SHOREY & HAYES, for the appellant.

Messrs. SLEEPER, WHITON & DURHAM, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of covenant, brought by appellee against appellant, on an instrument under seal, in the Cook Circuit Court. The agreement recites that appellant was indebted, at the time of its execution, to appellee, in the sum of $10,026.-25, the purchase money of 229 head of cattle, which became due on the 24th of December, 1866; and it was agreed that appellant should ship 109 head to Chicago, and sell them for the highest price, and after deducting expenses, apply the balance of the proceeds upon this indebtedness, to the amount of $6,000. After paying that sum on the indebtedness, or such amount as should be paid, appellant was to secure the remainder of the debt by a chattel mortgage on the balance of the lot of cattle, which was to be paid by the 1st of June, 1867, or that he should give satisfactory personal security. The cattle were to be shipped as soon as they could be put upon the market, and the proceeds to be applied to the payment of the debt as soon as the sale should be made; and Louis Hammond was to have control of the cattle, under the direction of appellant.

It appears that, on the 9th day of the following January, 107 head of the cattle were shipped, under the agreement, appellant, Hammond, and appellee, accompanying them. On reaching the stock-yards in Chicago, Hammond was offered 5¼ cents per pound, but appellant refused to sell, and the price declined until on the third day, appellee proposed to one McClung, if he could purchase the cattle of Hammond, that appellee's receipt would be taken in payment, and that he might buy them for appellee. McClung made the purchase at 4⅞ cents per pound, the expenses were deducted from the

gross proceeds—Hammond received his commissions in money, and appellee's receipt to appellant for the balance. Appellee paid to McClung the amount he paid Hammond, as commissions.

On the next day, appellant learned of the transaction, and replevied the cattle out of the possession of McClung and appellee. The cattle were by him placed in the hands of Hough, who sold them. Appellant failing to pay the money or to secure the debt, on the 4th day of February, 1867, this suit was brought. Appellant filed pleas of *non est factum*; that appellant applied the proceeds in payment of the debt as agreed, and that he had secured the balance; and a plea of set-off. Upon these pleas, issue was joined.

At the November term, the pleas were stricken from the files, under an agreement previously entered into by appellant's counsel, and a judgment by default for $10,851.31, was entered. At a subsequent day of the term, on a motion entered by appellant, an order was entered allowing appellant to plead issuably on the condition of his consenting to apply $5,452.13, received, towards the payment of the judgment; and ordering a stay of proceedings, and if less should be recovered, the judgment to be reduced, otherwise it was to stand.

Under this order, appellant re-filed his pleas, and at the next term of the court an additional plea was filed, on leave granted, which avers that appellant was prevented from making a sale of the cattle by reason of the sale by Hammond to McClung, and that it was a sham, made in pursuance of an agreement by them with appellee. Issue was joined on this, together with the other pleas. A trial was had by the court and a jury, and a verdict was rendered for the amount for which the previous judgment had been recovered. Thereupon the order staying proceedings under the judgment, was vacated. This appeal is prosecuted to reverse the judgment of the court below.

The questions attempted to be raised, as to the stipulation of the attorney who agreed that the pleas filed by him should be withdrawn on the contingency specified, and his withdrawal of the pleas, or the manner in which the case was docketed, do not arise on this record, as the court subsequently permitted appellant to re-file the pleas with another upon which a trial was had. It cannot, therefore, matter whether the action of the court in that respect was or was not erroneous, as a trial was subsequently had upon these pleas, and it is immaterial whether it was before they were withdrawn or after they were re-filed. We are unable to perceive how the action of the court, in this respect, could have prejudiced appellant in the slightest degree. Even where the court commits an error, and it is afterwards corrected, this court will not disturb the judgment of the court below. It is only in cases where errors are committed to the injury of the party seeking a reversal, that this court will reverse. Where no injury could have resulted to the party complaining, he has suffered no wrong and it would be idle to reverse.

It is urged that the court below gave improper instructions for appellee, and refused proper instructions asked for appellant. It is insisted that the court should have refused plaintiff's instructions. They informed the jury that if they believed that plaintiff had not prevented defendant from performing his covenants, and that defendant made a sale of the cattle and failed to pay over to plaintiff the proceeds of the sale, to the amount of $6,000, if it amounted to that sum, and secure the balance of the debt, and that the plaintiff kept his covenants, he would be entitled to recover.

This is the substance of the plaintiff's instructions, which were given. To them we see no objection. Appellant had covenanted to ship the cattle to Chicago and have them put upon the market, and have them sold by Hammond, under his directions, and when sold, apply $6,000 on the price of the cattle, and to secure the balance. And he was bound to

perform this agreement. If he sold the cattle after he replevied them, then he was required to pay that sum and secure the balance, according to agreement. And the sale made by Hough after defendant re-possessed himself of the cattle, was, we may safely conclude, under his instructions and for his use, and rendered these instructions proper.

Complaint is made that the court below refused to give appellant's third and fourth instructions. The first of his instructions which was given, informed the jury that, if they believed that appellant was prevented from performing his part of the covenants by the sale of the cattle by Hammond to McClung, at the instance of appellee, they should find for appellant. His second instruction, which was also given, and in substance instructed the jury, that if appellant was prevented from performing his covenants, by any act or acts of appellee, they should find for appellant. This embraced not only the sale to McClung, but all other acts of appellee which might have prevented appellant from keeping his covenants. And it would seem obvious, that any intelligent mind would have so understood it. If appellee procured the sale to be made to McClung, then that was an act of his, and if it prevented appellant from selling the cattle, paying the money and giving the security, which acts he had covenanted to perform, then the instruction manifestly told the jury to find for appellant; and these instructions having been given, it was unnecessary to repeat them in another form, and the instructions which were refused would have been but their repetition in substance. Nor could the jury have been misled by failing to modify appellee's instructions so as to announce the same rule, as it negatively did announce the same principle. And it was so clearly stated in appellant's instructions that it could not have been made plainer in any other form that might have been adopted.

The jury were fully warranted in finding that appellant had failed to perform his covenant. He refused to permit

Hammond to sell the cattle at the market price, as he agreed they should be put on the Chicago market without delay. They depreciated in price and he still refused, and whether appellee acted properly or not, in having the sale made to McClung, did not release him from paying the money when he had them sold by Hough. Even if Hammond's sale to McClung was not authorized, that did not release appellant from the performance of his covenants, and from paying appellee for the cattle purchased of him, and of which these were a part. It does not follow, that because appellee, seeing the cattle on a declining market at a heavy expense, and with fears that the price would not rise, endeavored to secure his debt by a sale of the cattle in a mode different from that provided in the agreement, appellant was absolved from paying for the cattle, or that appellee had forfeited the right to receive payment.

The judgment is affirmed.

Judgment affirmed.

NATHAN BARBERO

v.

JOEL THURMAN, Administrator.

LIMITATIONS—*of "exhibiting" a claim against an estate.** On the day appointed by an administrator for the adjustment of claims against an estate, and within two years after letters of administration were granted, a creditor of the estate filed his claim in the probate court: *Held*, that the claim was "exhibited" in the manner and within the time required by law to prevent the bar of the two years statute of limitations in regard to the presentation of claims against estates, not-

*See *Mason* v. *Tiffany, Adm'x.*, 45 Ill 393.

withstanding there was no special order of continuance from term to term, and the claim was dropped from the docket for a period of over three years before its final adjudication.

WRIT OF ERROR to the Circuit Court of Knox county; the Hon. ARTHUR A. SMITH, Judge, presiding.

The opinion states the case.

Mr. A. M. CRAIG, for the plaintiff in error.

Mr. P. H. SANFORD, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court

This was a claim, in the form of a promissory note, filed for allowance against the estate of William Darnell, deceased, on the 16th of March, 1863, in the Knox County Court—that being the day appointed by the administrator for the adjustment of claims. It was continued to the April term, and then to the May term, and after that was not docketed, but no order had been made disposing of the claim. At the September term, 1866, the case was again docketed, and the parties appeared and continued it by agreement to the 4th of October, when it was again continued by agreement of parties to the October term. At that term the cause was tried, and the court allowed the claim. An appeal was prosecuted to the circuit court, where the claim was disallowed, and the record is now brought here.

It is contended,—and this is the only defense made to the note,—that it is barred by the two years statute of limitations in regard to the presentation of claims against estates. The argument is, that, although the claim was presented on the day named by the administrator, and was of a character to require no proof unless impeached by evidence on behalf of

the estate, still the fact that it was dropped from the docket, and allowed to remain without adjudication for more than three years, should operate as a bar, and the cases of *Propst* v. *Meadows*, 13 Ill. 157, and *Reitzell* v. *Miller*, 25 ib. 70, are quoted as authority.

The point really decided in *Propst* v. *Meadows* was, that a claim which had been filed at the time appointed by the administrator, and which was not adjudicated, and not continued to a future term by an express order, could not be taken up at a future term and allowed, in the absence of the administrator, and without notice to him. In *Reitzell* v. *Miller* the court merely decided that the filing of a claim in the probate court at a time not appointed by the administrator for the adjustment of claims, was not such a commencement of suit as would stop the running of the general statute of limitations of five years.

Neither of these decisions covers the case at bar. The statute of wills provides, that all demands not exhibited within two years after letters of administration are granted shall be barred, except as to property not inventoried. The appellee relies upon this statute. But the statute says, "the manner of exhibiting claims against the estate of any testator or intestate may be by serving a notice of such claim on the executors or administrators, or presenting them the account, or filing the account or a copy thereof with the court of probate." In this case the note was filed within the two years, and on the day fixed by the administrator. The appellant has thus literally complied with the requirements of the statute. What matter that the clerk neglected to keep it on the docket, or that there was no special order of continuance from term to term? Granting that this rendered a new notice to the administrator necessary before allowing the claim, yet it did not affect the fact that the claim had been exhibited within the time, and in the manner, required by the statute, and the bar of the statute saved. The administrator was thus apprised of its existence,

and before its final adjudication he was again notified, and after another continuance by consent the claim was litigated and allowed.

We are of opinion that the claim was not barred, and the judgment of the circuit court must be reversed.

Judgment reversed.

JOSEPH STRICKFADEN

v.

LORENZ ZIPPRICK.

1. NEGLIGENCE—*contributory—in what actions the question of—does not arise.* In an action on the case, against an officer, to recover damages for his willful neglect to perform an imperative duty imposed upon him by statute, the question of contributory negligence can not arise.

2. SAME—*malice—in such cases—question of—unimportant.* And in actions of this character, the question of malice is unimportant, except as bearing upon the question of damages.

3. SAME—*of the gravamen of the action.* In such cases, the gravamen of the action is not the wrongful act, but the neglect to perform an imperative duty, and the good faith with which the defendant acted, or failed to act, can not be considered.

4. PRACTICE—*exceptions to instructions—when presumed to have been taken in due time.* Where an exception to an instruction appears in regular order upon the record, immediately following the instruction excepted to, this court will presume that such exception was taken at the time the instruction was given.

APPEAL from the Circuit Court of Tazewell county; the Hon. CHARLES TURNER, Judge, presiding.

The opinion states the case.

Messrs. PRETTYMAN & RICHMOND and Mr. W. F. HENRY, for the appellant.

Mr. C. A. ROBERTS and Mr. N. W. GREEN, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

We have confined our attention chiefly to the fifth error assigned by the plaintiff, and that is, the court gave improper instructions for the defendant.

The action was case, for willfully neglecting to return the road tax assessed against the plaintiff, and which he had fully paid by labor on the highways, of which the defendant was commissioner, by means of which the plaintiff was coerced to pay it a second time, and that, too, by a forced sale of property.

This being the nature of the case, it is clear, the question of contributory negligence could not arise, and did not arise, in the case. The plaintiff, having nothing whatever to do with the failure of the officer to perform his duty, could, by no possibility, contribute to his negligence. Instructions numbered 3, 5 and 7, given for the defendant, should, therefore, have been refused.

It is further objected, by the plaintiff, that the defendant's sixth instruction was erroneous. It is as follows:

"In this case, the plaintiff complains of the defendant of an act done willfully, maliciously, corruptly and **wrongfully** by defendant, resulting in a damage to plaintiff, for which the suit is brought, and to recover, the plaintiff must show, by preponderance of evidence, something more than mere negligence on the part of the defendant, in committing the act complained of."

In the view we have taken of the case, the question of malice was unimportant, except as bearing upon the question of damages.

The defendant objects, that the record does not show at what time the exception was taken. As it appears in regular order upon the record, immediately following the instructions, this court will intend that the exception was taken at the time the instructions were given.

As to the modification of plaintiff's instructions, we are of opinion the court erred in striking out the words, "The plaintiff may recover although the defendant acted in the utmost good faith." The defendant was charged with a violation of a plain and imperative duty for which the good faith with which he acted, or failed to act, is not an element to be considered in the case.

So, too, the court erred in inserting in the second, third and fourth instructions, the words, "wrongful act," as the gravamen of the action was not the wrongful act, but for his willful neglect in refusing to act in obedience to the imperative command of the law. The action of the defendant, which the law required him to perform, was to mark on his list, against the plaintiff's land assessed for road tax, the word "paid." It was for non-action the action was brought,—not for a wrongful act.

The judgment is reversed and the cause remanded.

Judgment reversed.

Syllabus.

THE CHICAGO DOCK COMPANY

v.

JULIETTE A. KINZIE.

1. DOWER—*release of—may be made—to a purchaser from the owner of the fee.* In a proceeding by the widow of K, against C, for an assignment of dower in certain premises, the proof showed that K, her husband, conveyed the property to J, but that, by this deed, there was no relinquishment of dower. Subsequently, J conveyed the premises to H, who gave his notes for the purchase price, secured by a deed of trust upon the premises. H made this purchase, and took a conveyance in his own name, under a verbal agreement with O, that O should make the first three payments, and that if H made the last payment, he should have one-fourth of the property, and if O made all the payments, he was to take the whole. O entered into possession of the premises and made all the payments. When O had paid one-half of the purchase price, K and wife conveyed the premises to him, by which deed petitioner released her right of dower in the same, and afterwards O and H conveyed the property to C. K died about eight years after this latter conveyance. *Held*, that O, at the time of the execution to him of the deed by K and the petitioner, held such an interest in the premises as enabled him to become the releasee of the dower right, and that such deed operated to bar petitioner's right to recover dower in the premises.

2. STATUTE OF FRAUDS—*parol contract for the purchase of lands—as between the parties—equity will enforce—unless the statute is pleaded.* That, by the verbal agreement between O and H, an express trust was created, which, had O filed his bill against H to have executed, a court of equity would have enforced, unless H had interposed the statute of frauds as a defense.

3. SAME—*statute can not be pleaded by strangers to the contract.* That petitioner, being a stranger to this agreement, can not object, that because it was not in writing it is, therefore, void under the statute of frauds. This statutory defense is personal, and can not be made by persons who are neither parties nor privies to the agreement.

4. FORMER DECISIONS. In the cases of *Blain* v. *Harrison*, 11 Ill. 384, and *Summers* v. *Bubb*, 13 ib. 483, the rule is too broadly stated, if it was intended to hold that the right of dower can only be released to the owner of the fee.

5. DOWER—*to whom it may be released.* Dower may be released to the owner of the fee, or to a person in privity with the estate, who can not assert the dower right against the owner of the fee. Hence, a tenant of the freehold, an equitable owner, a purchaser from the owner of the fee, although his contract be

unexecuted, or one who has warranted the title, may become a releasee of the dower right.

6. CHANCERY PLEADING—*variance between the proof and answer.* And in this case, it is no objection that the evidence varies from the answer of the defendants, the material allegation therein, and which constituted a good defense, having been proved.

7. And in such case, the proof showing that the petitioner, on two occasions, attempted to divest herself of this right, and that in each instance, she and her husband received a satisfactory consideration for its relinquishment, under such circumstances, nothing but the stern and inflexible rules of law should entitle her to dower in the premises.

APPEAL from the Superior Court of Chicago.

The opinion states the case.

Messrs. SCAMMON, MCCAGG & FULLER, for the appellants.

Messrs. MILLER, VAN ARMAN & LEWIS, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a petition filed by appellee, in the Superior Court of Chicago, against appellants, for the assignment of dower in lot thirty-five and its accretions, in Kinzie's addition to the city of Chicago. It appears that appellee was married to John H. Kinzie in 1833, and that he died in June, 1865; that Robert A. Kinzie owned the premises, and on the 25th of February, 1833, conveyed them to John H. Kinzie; that on the 1st day of September, 1834, he and appellee conveyed the premises in question to William Jones for a valuable consideration. It however appears that the certificate of acknowledgment to this deed was defective, and was insufficient to bar appellee's right of dower in the premises.

On the 15th day of July, 1856, William Jones conveyed this lot to Van H. Higgins, for the sum of one hundred and

fifty thousand dollars; subsequently, on May 23d, 1857, Jones executed another deed to Higgins for the same property, and on the 10th day of November, 1857, Higgins conveyed to appellants for the consideration expressed in the deed of three hundred and seventy-five thousand dollars.

The evidence shows that Higgins made the purchase in his own name, but under an arrangement with William B. Ogden that the latter should make the first three payments, and if Higgins should make the last he should have one-fourth of the property, and if not, Ogden was to have all of it. Higgins made no payment, and the whole lot was conveyed to appellants, and Ogden made all of the payments. It also appears that at the time Higgins made the purchase, he received the deed, gave his notes for the deferred payments, and executed a deed of trust to Jones to secure their payment, and Ogden thereupon entered into possession, and so continued, until the company entered upon the improvements that they are constructing upon the lot.

After Ogden had made two payments,—or had paid one-half of the purchase money,—he received a deed of conveyance from John H. Kinzie and appellee. This deed, although it bore a prior date, was acknowledged, and appellee, in due form, relinquished her right of dower in the premises, on the 19th day of November, 1857, and appellants rely upon this deed to bar appellee's right to recover dower in the premises. But, on the other side, it is contended that it could not have the effect to bar her dower, because Ogden was not the owner of the fee, either in law or in equity, and hence, was a stranger to the title, and could not receive a release of her right of dower.

Appellants contend that, as Ogden was a purchaser and in possession, although he had paid but a portion of the purchase money at the time the release was made, he had such an equitable interest in the land as enabled him to receive the release. The whole controversy turns upon this question. At the

common law, a chose in action, or a mere right of recovery could not be assigned, nor could a release be made to a person who had no interest in the subject matter to which it related. Hence, to render a release effective, it was necessary that the releasee should own the title to the right or property to which the release related; hence, the release of a term, incumbrance or other right, could only be made to a privy in law or in title. The same rule governed the claim of dower, before it was admeasured and assigned to the dowress. She could not release or transfer her right, before assignment, to a stranger to the title to the land. But in Lampet's case, 10 Coke, 48, it was held that a release may be made to the tenant of the freehold, in fact or in law, without privity, the remainder-man, the reversioner without privity, to a person having right by reason of privity, and to the person having right without privity. The question, then, presents itself, whether Ogden, as the purchaser, in fact, occupied either of the relations referred to in Lampet's case. Was he in privity in deed or in estate? If so, then he was capable of receiving the release, so as to bar the widow's dower.

It is objected that he was neither, as he did not hold the title to the fee, and was not a *cestui que trust;* that, as the land was purchased, and the deed taken to Higgins by arrangement between him and Ogden, a resulting trust was not created, and notwithstanding Ogden paid the money on the agreement that Higgins should convey to him in a particular event the entire lot, and in another but three-fourths of it, still, as the contract was not evidenced by a written agreement, that it is within the statute of frauds, and was, therefore, void. It is certainly true, that a resulting trust can not be created by the agreement of the parties, but it always results from an inference or implication of law. And, from the facts in this case, it can not be contended that a resulting trust was created, as, if a trust was created, it was express and by agreement of the parties.

It is, however, equally clear, that an express trust was created, whether such as the law prohibits from being enforced or not, still it was a trust. All persons in the profession know that, when a person purchases land to be held in trust for another, by agreement, upon a valid consideration, a court of equity will execute the trust and compel a conveyance, although the agreement rested in parol, unless the defendant expressly pleads the statute, and relies upon it as a defense. And in this case, had Ogden completed the payment for the lot, and filed his bill in equity against Higgins to have the trust executed, the court would not have hesitated to enforce the agreement to convey, if the statute had not been pleaded as a bar. Prior to the statute of frauds, such contracts were uniformly enforced, and are still, unless a plea of the statute is interposed. He then held as a purchaser under a verbal agreement, that could only be defeated by Higgins interposing the statute as a defense.

Again, this statutory defense is personal, and can not be interposed by strangers to the agreement. Like usury, infancy, and a variety of other defences, it can only be relied upon by parties or privies. Mere strangers have no right to plead or insist upon it for the benefit of others. It in nowise concerns them, and hence it must be left to the parties making it, or those holding in privity with him, to make it or not, as they may choose. It then follows, in this case, that appellee can not be heard to insist that the contract between Ogden and Higgins was not binding. It was for Higgins alone to determine whether he would execute the trust or avoid it under the statute of frauds; and the evidence shows that he regarded it as binding, and in good faith executed the trnst by conveying it to appellants according to Ogden's request. Ogden, then, held the verbal contract for the title, when he should pay the money, and this constituted him a privy to the estate, and in equity entitled to have it executed, unless Higgins had interposed the bar of the statute. We have no hesitation in saying

that a purchaser of the fee, although his contract is unexecuted, is in such privity to the estate as will enable him to receive a release of the right of dower from the widow.

In such a case he is not a mere stranger, but has an interest in the estate. In such a case he takes the release to attend the estate, and not to hold or enforce it against the holder of the fee; and in this case the right of dower became united with the fee, as Ogden and Higgins both conveyed the premises to the company. Had Ogden failed to meet the payments, and had the arrangement entered into between him and Higgins never been executed, a different question might have then been presented, but we deem it unnecessary to discuss it in this case, as it does not arise on this record.

In the case of *Bailey* v. *West*, 41 Ill. 290, it was held that an owner in equity held such a title as enabled him to take a release of the right of the widow to dower; and in the case of *Robbins* v. *Kinzie*, 45 Ill. 354, it was held that a grantor of the fee, by a conveyance with covenants of warranty, was such a privy as was capable of receiving such a release; and in this latter case it was said that a tenant of the freehold, in fact or in law, was capable, without privity to the fee, to receive such a release. And the authorities announce the rule, that he who holds but a freehold estate may receive a release. In Coke's Litt. sec. 447, it is said, that in some cases a release of a right to a person who has neither a freehold in deed nor in law, is good and valid; and, as an example, it is said a demandant may release to the vouchee, and yet he has nothing in the land. And the rule is too broadly stated in *Blain* v. *Harrison*, 11 Ill. 384, and *Summers* v. *Babb*, 13 Ill. 483, if it was intended to hold that the right of dower can only be released to the owner of the fee. If it was intended to hold that it might be released so as to unite with the fee, or those holding under the same title and in privity with the fee, then it is correct. A valid release of dower to either the tenant for life, or to the remainder-man or reversioner, may undoubtedly be

made. And we have seen that it may be made to the equitable owner. So, it will be observed, it is not indispensable that the releasee should be invested with the fee.

In the enforcement of all common law rules, they must be held to have spirit as well as letter. They must have an application to all cases where the facts fall within the reason of the rule. Hence, courts never limit their application to but one state of facts, but apply them to all cases where it is demanded by the reason of the rule. Until dower is assigned, it is but a right of action, and it is contrary to the policy of the common law to permit such rights to be transferred or assigned so as to vest the right of action in another. And this is the reason why the right of dower, before it ripens into an estate by assignment, can not be aliened or assigned. But the reason of the rule ceases when it is released or transferred to the owner of the fee, or to a person in privity with the estate, so that he can not assert it against the owner of the fee. And this is accomplished when it is released to the owner of the fee, to the tenant of the freehold, to the equitable owner, to a purchaser from the owner of the fee, or to one who has warranted the title. In no one of these cases could the person to whom it is released assert it against the owner of the fee, but it thereby becomes merged and extinguished.

We have seen that Ogden was a purchaser, under an executed agreement, for the purpose of uniting it to the fee, and that it was subsequently united and extinguished; and it can not matter whether Ogden was, by the agreement, to receive the title to all or but three-fourths of the lot. He was nevertheless a purchaser, and had paid half of the purchase money on the lot. Nor could it matter that there was an arrangement that a company was to be formed for the purpose of improving the lot, or that others may have had an arrangement with Ogden by which they could pay a portion of the purchase money and have an interest in the lot, in proportion to the amount they might pay, as Ogden was a purchaser of

such an interest as would prevent him, after he received the release, from asserting the right against the others. He was the purchaser of such an interest as enabled him to take the release. One tenant in common may unquestionably receive a release from a dowress, and it will enure to the benefit of the estate and not alone to his individual interest.

It is urged that the evidence varies from the answer of appellants, and that they have, therefore, failed to make out a defense. It is true that it does, but not so far as to defeat the defense. All of the material allegations of the answer are proved. It can not matter that it is alleged that the company was formed, but not organized, when the conveyance was made by Jones to Higgins; or that Laflin furnished a portion of the money to make the first payment; or that others had the right to make payments towards the purchase and receive an interest in the title. It was alleged that Ogden was one of the purchasers, and we have seen that, being such, he had an interest in the title that gave him the right to receive the release. The important question was, whether he had such an interest as authorized him to receive the release, and the answer showed that he had. It perhaps showed that any or all of those with whom Ogden was acting could have received it. The claim of appellee does not appeal to the conscience of the chancellor for relief. She made efforts on two occasions to divest herself of her right of dower, and from the deeds it appears that on each occasion she and her husband received a satisfactory consideration for the relinquishment. Under such circumstances, nothing but the stern and inflexible rules of law should entitle her to recover.

For the reasons above indicated, the decree of the court below must be reversed and the cause remanded.

Decree reversed.

Syllabus.

WHEELER

v.

KINZIE.

Mr. JUSTICE WALKER: This case, in all its material features, is the same as the preceding case, and for the reasons there given, the decree must be reversed and the cause remanded.

Decree reversed.

CHARLES CHINIQUY

v.

LOUIS DELIERE.

FORMER DECISION. The views expressed by this court, in a former opinion delivered in this case, and reported in 37 Ill. 460, are not changed by the facts in the record now presented.

APPEAL from the Circuit Court of Kankakee county; the Hon. CHARLES H. WOOD, Judge, presiding.

This case was before the court at a former term, and is reported in 37 Ill. 460, where a sufficient statement of the facts will be found.

Mr. STEPHEN R. MOORE, for the appellant.

Mr. C. A. LAKE, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

The only material difference in this case, as now presented by this record, and as it appears in 37 Ill. 460, is, that the parties, in the last trial, were sworn as witnesses. Their testimony does not change the views we entertained and expressed in the opinion, and we cannot perceive that any special promise by Chiniquy, the pastor of the church, to pay Deliere for his services as sexton, has been proved. We think there is an absence of testimony sufficient to fix the liability upon the pastor. The engagement, if any, was made by the trustees of the church, and to them Deliere should look for payment. The various statements made by Chiniquy, about Deliere and his services, are all consistently referable to his own position as pastor, whose duty it was, not to hire and pay the sexton, but to have a supervisory care over the church and its belongings, and its employees.

We still think, no obligation to pay for the services of the plaintiff, as sexton of the church, has been established against the defendant, and those he rendered defendant on his farm and in his garden, have been paid for in full. The jury must have blended together the two kinds of services rendered, and applied a promise to one kind, which really belonged to the other.

The verdict is so much against the weight of the evidence, that we are constrained again to reverse the judgment, and remand the cause for a new trial.

Judgment reversed.

Syllabus.

SOLOMON BAKER

v.

CHARLES ROBINSON.

1. NEW TRIAL—*verdict against the evidence.* An appellate court will not disturb the verdict of a jury merely because the evidence is conflicting, or because there may be doubt as to its correctness. It must be clearly wrong to require it to be set aside.

2. INSTRUCTIONS—*need not be repeated.* Where an instruction is asked which is a repetition, in substance, of one already given, it may properly be refused.

3. SAME—*must be based upon the evidence.* An instruction which is not based upon any evidence in the case, should not be given.

4. IMPEACHING A WITNESS. A mere conflict of testimony is not what is called impeaching evidence.

5. PRACTICE—*of raising a question by an instruction.* In an action of replevin for a colt, it appeared that while the animal was in the possession of the plaintiff, the defendant, claiming to be the owner, obtained permission to take it home with him, upon the condition, that if, after his family had examined the colt, they would not identify it as his, upon oath, before a justice of the peace named, he would return it the same day, the evidence showed that the defendant neither procured the evidence nor returned the colt. Instructions were given, based upon the hypothesis that neither party owned the colt: *Held*, if the plaintiff desired to raise the question whether the defendant was bound to return the animal when he failed to make the proof proposed, he should have asked an instruction presenting that question.

APPEAL from the Circuit Court of Jo Daviess county; the Hon. BENJAMIN R. SHELDON, Judge, presiding.

The facts are fully stated in the opinion of the court.

Mr. M. MARVIN and Mr. D. W. JACKSON, for the appellant.

Mr. OLIVER C. GRAY and Mr. E. A. SMALL, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that in the month of April, 1864, appellant purchased of Barton a colt, which he claims to be the same one now in controversy. At the time of the purchase the colt was but a few days old; it was taken to his house and fed, and remained in his possession until in the month of July, 1865, when it strayed away. About the middle of October following, appellant and his son went to the house of one Wilson, about four miles distant, and there found the colt in controversy, took it home and kept it during the remainder of the fall and the ensuing winter, and used it in the spring with their other horses. About the 1st of June, 1866, appellee came to the residence of appellant and claimed the animal as his. After some controversy appellee proposed to take it home with him, and if, after his family had examined it, they would not swear to it, before a justice of the peace who was named, he would return it to appellant on the same day. It was taken, but no affidavits were made, nor was the colt returned.

Appellant thereupon sued out a writ of replevin from a justice of the peace, and upon a trial the jury found a verdict for appellant, but the case was removed by appeal to the circuit court, where another trial was had before the court and a jury, and a verdict was rendered in favor of appellee, upon which judgment was rendered, and to reverse which this appeal is prosecuted.

It is first urged, that the finding is manifestly against the evidence. On the trial there was much and conflicting evidence as to the identity of the animal in dispute. In such cases this court rarely disturbs the finding of a jury. It is only in cases where, from the evidence, it appears that the preponderance is decidedly against the verdict, and where, from the record, we feel no hesitation in believing that the verdict is wrong and should be set aside. The judge and the jury who try the case have greatly better facilities for ascertaining the truth than an appellate court. They see the

witnesses, and from their appearance and manner on the stand can readily determine to which the greater credit should be given. And after the trial is closed, the judge trying the case, upon a review of the evidence, when asked for a new trial, must say whether he believes the verdict is right. This is a duty the law has devolved upon him, and when he has deliberately said that he is satisfied with the finding, we are not inclined, for the mere reason that the evidence is conflicting, and leaves doubts on our minds whether it is strictly right, to disturb the verdict. In this case we only feel doubt, and not conviction, that the verdict is wrong, and hence, must decline to reverse on the ground that the verdict is against the weight of evidence.

It is objected, that the court refused to give appellant's fourth instruction. It will be observed that his third instruction, in other language, announces the same rule. The court below, therefore, had the right to refuse to repeat the same instruction, although slightly varied in form. It is also objected, that the court erred in refusing to give appellant's fifth instruction. It asserted that, if any of appellee's witnesses had been successfully impeached, the jury were at liberty to disregard their testimony unless corroborated by other testimony. We do not discover that witnesses were called to impeach any of appellee's witnesses, nor can we see, from the record, that there was anything else impeaching them. There was conflict of evidence, but that is not what is called impeaching evidence. We therefore perceive no evidence upon which to base this instruction.

It is also urged, that the court should have refused the instruction given for appellee. It only states that, if the reverse of the hypothetical case put in appellant's third instruction was true, they should find for appellee. It informed them, that if they believed that appellant was not the owner of the colt, or has not a better right to it than appellee, they should find for the latter. In the third of appellant's

instructions the court had told the jury, that if appellee obtained possession of the property from appellant, and had no title, and title had not been shown in a third person, appellant's title would be the best. The instruction for appellee did not conflict with appellant's third instruction, and hence it was not error to give it.

If appellant had desired to raise the question whether appellee was bound to return the colt when he failed to make the proof he agreed to do when he obtained the possession, he should have asked an instruction presenting that question. It is not raised on the record, and we can not, therefore, consider it. We do not see that the jury were misdirected, or that proper instructions were refused; nor do we perceive that the evidence fails to support the verdict of the jury.

No error being perceived in this record requiring the reversal of the judgment of the circuit court, the judgment must be affirmed.

Judgment affirmed.

BENJAMIN HARTLEY

v.

ZENAS HARTLEY.

NEW TRIAL—*verdict against the evidence.* Where there is evidence to support a verdict, it will not be disturbed.

APPEAL from the Circuit Court of Woodford county; the Hon. S. L. RICHMOND, Judge, presiding.

This was an action of assumpsit, brought by Benjamin Hartley against Zenas Hartley, wherein the plaintiff obtained a judgment for $25, from which he appealed to this court.

Mr. H. B. HOPKINS and Mr. C. H. CHITTY, for the appellant.

Mr. JOHN CLARK, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

This is a very small case, which should not have been brought to this court.

We cannot interfere, there being evidence to sustain the verdict, and no error in the instructions.

We must affirm the judgment.

Judgment affirmed.

BERNARD MAYNZ

v.

JOHN R. ZEIGLER.

NEW TRIAL—*verdict against the evidence.* Where a verdict is manifestly against the evidence, a new trial will be granted.

APPEAL from the Circuit Court of Peoria county; the Hon. EDWIN S. LELAND, Judge, presiding.

The opinion states the case.

Messrs. INGERSOLL, MCCUNE & PUTERBAUGH, for the appellant.

Mr. JULIUS STARR and Mr. H. B. HOPKINS, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This suit was originally brought before a justice of the peace, on a promissory note for $85, due three months after date, and payable to Adolphus G. Mandel & Co., and endorsed by them to appellant. On the trial before the justice, appellee recovered judgment for costs, and the case was removed to the circuit court, where a trial *de novo* was had, with a similar result; and the case is brought to this court by appeal, and we are asked to reverse the judgment of the court below, because it is not sustained by the evidence.

It appears from the evidence contained in the bill of exceptions, the note was given on the purchase of a half barrel of varnish; that the varnish was sent to appellee by boat from Pekin to Peoria; it was called for several times at the railroad depot, by appellee, but was not found, as it was in the warehouse of the river packet company.

It is contended by appellant, that he was, by agreement, to ship it by rail or boat, and by appellee, that it was to be by rail. Some time after the maturity of the note, and after it was presented and payment refused, because appellee had failed to receive the varnish, it was found in the warehouse of the packet company, but appellee declined then to receive it. The defense interposed is a failure of consideration, and that the note was assigned after maturity.

Appellee and two other witnesses swear that after the note became due, one of the Mandels, of the firm to whom the note was made payable, presented it, saying that his brother, who sold the varnish and took the note, had directed him to collect

it, and when payment was refused, he threatened to bring suit, but said nothing about any one else being the owner.

On the other hand, appellant and Mandel swear, that it was assigned before its maturity, *bona fide*, and for a valuable consideration; and Stone, the Cashier of the First National Bank, testifies that the note was sent to their bank for collection by appellant, and was received on the 6th of January, 1865, some 21 days before it became due, and that it was then endorsed as it is at present.

What appellee's witnesses say about Mandel's threats of transferring the note, may not, and we presume was not, correctly understood by them. In the light of the other testimony, we must conclude, that he said that it had been assigned, and not that it would be for the purpose of suing on the note.

While there is some slight conflict in the evidence, the weight is manifestly in favor of the assignment of the note before it fell due. Appellant, Mandel and Stone, all swore to the assignment having been made before its maturity. No witness on behalf of appellant, swears to seeing the note unassigned after the day of payment. They only state, that it was in the hands of one of the payees, and that he threatened to sue—spoke of the note as though it belonged to his firm, and did not say it belonged to any other person. This evidence is slight and but circumstantial, while the evidence on the other side is positive, clear and convincing, unless we conclude that appellant and his witnesses have all sworn falsely. But appellant swears that he placed the note in the hands of Mandel, a traveling agent of the firm, to collect for him. If this is true, then there is no real conflict in the evidence, but it is all easily reconciled, and is not inconsistent, and proves the assignment of the note before maturity. We are satisfied the evidence proves that fact, and that the court below erred in refusing to grant a new trial, because the evidence fails to support the verdict. The judgment of the court below must be reversed and the cause remanded.

 Judgment reversed.

JOSIAH MARTIN *et al.*

v.

BENJAMIN BREWSTER *et al.*

SENDING PROCESS TO A FOREIGN COUNTY. Where the defendant in an action in which the summons was sent to a foreign county for service, pleads in abatement, that the cause of action did not accrue, and was not specifically made payable, in the county in which the suit was instituted, and an issue is formed upon such plea, if the plaintiff fails to prove that the cause of action did accrue, or was specifically made payable, in the county from whence the writ issued, it is error to render a judgment in his favor.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

This was an action of assumpsit, brought by Brewster, Templeton & Co., in the circuit court of Cook county, against Martin & Hogue, upon an account of which this is a copy:

"Messrs. MARTIN & HOGUE,
In account with Brewster, Templeton & Co.

1867.

Sept. 14. *Dr.* To cash paid for oats to fill contract with Dean, Low & Co.,

1846.08 bush. at 55½c	$1,080.17	
1745.30 " " 56c	960.26	
3692.06		$2,040.43
665.30 bush. from M. & H., sale 755		
641.28 " " M. & H., " 766		
5000.00 bush. amount of sale.		
Dr. To commissions for purchase and sale of 3692.06 at 1c	36.92	
" government tax on sale of 1476.88	1.48	
		$2,078.83

Cr.

Sept. 14. By sale of 3692.06 bush. oats at 40c	1,476.88
Balance due B., T. & Co.	$ 601.91

E. & O. E. CHICAGO, Sept. 14th, 1867."

Statement of the case.

The summons sued out in the cause was sent to the sheriff of Warren county for service upon the defendants in that county, and it was returned served.

The defendants filed a plea in abatement, alleging, first, that the defendants, at the commencement of the suit, were, ever have been since, and still are residents of Warren county, and neither have been found nor served with process in Cook county; second, that said debts, contracts or causes of action, if accrued, did not accrue in said Cook county, nor were they made payable in said Cook county.

The plaintiffs replied, first, that the said contracts, debts and causes of action, each in the said plaintiff's declaration mentioned, were specifically made payable in the said county of Cook; second, that the said debts, contracts and causes of action, mentioned in said plaintiff's declaration, did actually accrue in said county of Cook.

The plaintiffs called on Hill, who testified as follows:

"I am book-keeper for plaintiffs. The moneys described in account attached to declaration as advanced by plaintiffs were so advanced in Chicago at the request of defendants. The defendants agreed to pay interest at ten per cent.; this was the course of dealing between the parties—to allow interest; I have computed the interest, and the debt, principal and interest amounted to $637.05."

This was all the testimony in the case. A verdict was returned for the plaintiffs, and their damages were assessed at $637.07, and judgment accordingly.

The defendants thereupon took this appeal. The question presented on the assignment of errors is, whether the circuit court had jurisdiction to send its process to a foreign county.

Mr. GEORGE F. HARDING, for the appellants.

Mr. WM. C. GRANT, for the appellees.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

The judgment in this case, on the authority of *Mahony* v. *Davis*, 44 Ill. 288, must be reversed.

The plaintiff made no proof under the issue on the plea in abatement that the cause of action accrued in Cook county, or that it was specifically made payable in that county.

The judgment is reversed and the cause remanded.

Judgment reversed.

GEORGE BAKER

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

INDICTMENT—*for an assault with a deadly weapon, with intent to do bodily injury.* An indictment for an assault with a deadly weapon, with intent to do a bodily injury, must aver, either that no considerable provocation appeared, or that the circumstances of the assault showed an abandoned and malignant heart. These are the elements which constitute the offence, and if not found in the indictment, it would be defective.

WRIT OF ERROR to the Circuit Court of Kane county; the Hon. SYLVANUS WILCOX, Judge, presiding.

The opinion states the case.

Mr. W. D. BARRY, for the plaintiff in error.

Mr. ROBERT G. INGERSOLL, Attorney General, for the people.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

This was an indictment in the Kane Circuit Court, against George Baker, for an assault with a gun upon one William Warner, with intent to inflict a bodily injury.

There were two counts in the indictment, both of which were sustained on a motion by defendant to quash the indictment. The jury found the defendant guilty, in manner and form as charged in the second count.

A motion to arrest the judgment was overruled, and judgment entered for a fine of $25 and costs, to reverse which, the record is brought here by writ of error.

The second count, after the formal parts, is as follows: "with force and arms, in and upon the body of William Bruner, then and there being, feloniously, wilfully and of his malice aforethought, did make an assault, and with a gun charged with gunpowder and loaded with shot, which he then held, then and there, feloniously, wilfully and of his malice aforethought, did shoot against Bruner, with intent, against him then and there to inflict a bodily injury, feloniously and wilfully," &c.

The indictment was found under sec. 52 of the Criminal Code, the second count of which was designed to bring the case within the last clause of that section, but which does not negative the exceptions therein, there being no averment that no considerable provocation for making the assault appeared, or that the circumstances of the assault showed an abandoned and malignant heart.

The offence charged, is an assault with a deadly weapon, with intent to do a bodily injury, and an indictment for such offence must aver either that no considerable provocation appeared, or that the circumstances of the assault showed an abandoned and malignant heart. These are the elements which constitute the offence, and if not found in the indictment it would be defective, as the offence charged would not be brought within the statute—it is not brought in the terms and

language of the code, or so plainly described as that the nature of it may be understood by the jury.

We have been referred to the case of *Beckwith* v. *The People*, 26 Ill. 500, as sustaining a verdict and judgment upon such an indictment. There the indictment was for an assault with intent to murder, and this court held, under such an indictment, the jury might find the defendant guilty of an assault with a deadly weapon with intent to inflict a bodily injury, the jury having found by their verdict, that the circumstances of the assault showed an abandoned and malignant heart. The court say, the jury found by their verdict, and so the statute required, in order to constitute the crime, that the circumstances of the assault showed an abandoned and malignant heart, and this is precisely the mental condition ever present when a murder is committed.

But in this case, the indictment was for an assault with a deadly weapon, with the intent, not to murder, but to inflict bodily injury, an element of which offence is, either that no considerable provocation appeared, or that the circumstances showed an abandoned and malignant heart, neither of which appears by the record to have existed.

The motion to quash the indictment should have been allowed. For refusing it, there was error, and for the error the judgment must be reversed.

Judgment reversed.

Syllabus. Statement of the case.

THE BOARD OF TRUSTEES OF THE ILLINOIS AND MICHIGAN CANAL

v.

GEORGE W. ADLER.

1. WITNESS—*examination of one whose deposition has been taken.* Anciently, when a witness had given his deposition, neither party was permitted to again examine him, by deposition or otherwise. But the rule has been modified, so that, when the deposition of a witness has been read to the jury, the opposite party may call him as his own witness.

2. But where a deposition has been regularly taken, the opposite party having the right to attend and cross-examine the witness, such party, on failing to exercise that right, cannot be permitted afterwards to cross-examine the witness as the witness of the party who took the deposition. By failing to attend at the taking of the deposition the adverse party waives his right to a cross-examination.

3. ILLINOIS AND MICHIGAN CANAL—*who may be sued for negligence in respect thereto.* Where an injury results from a neglect to keep the Illinois and Michigan Canal in repair, an action therefor is given against the State Canal Trustee, but it will not lie against the Board of Trustees.

APPEAL from the Superior Court of Chicago; the Hon. WILLIAM A. PORTER, Judge, presiding.

This was an action brought in the court below, by George W. Adler, against The Board of Trustees of the Illinois and Michigan Canal, to recover damages alleged to have resulted from a collision of the plaintiff's canal boat with a sunken wreck in the canal. A trial was had and a judgment in favor of the plaintiff. The defendant thereupon took this appeal. The questions arising upon the assignment of errors are presented in the opinion of the court.

Mr. GEORGE C. CAMPBELL, Mr. H. W. BLODGETT, Mr. J. O. GLOVER and Mr. ISAAC N. ARNOLD, for the appellants.

Messrs. RAE & PROUDFOOT, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

In October, 1865, the canal boat Gibraltar, with a cargo of corn, was being transported over the Illinois and Michigan Canal, and when near Lockport, about eleven o'clock at night, it ran against the Crotty, another canal boat which had sunk at that point. There were no lights nor was there any person on the sunken boat to give warning of the danger, and the night was dark. The owners of the sunken boat were at the time engaged in raising it, and for the purpose had a lighter alongside of the wreck, upon which they had placed a light as a signal. It does not appear that there was any negligence on the part of those navigating the Gibraltar when the collision occurred and the boat was sunk.

It is first objected, that the court below erred in not permitting appellants to place two of appellee's witnesses, whose depositions had been read, on the stand, and to cross-examine them. We are aware of no case which sanctions such practice. Anciently, when a witness had given his deposition, neither party was permitted to again examine him, by deposition or otherwise. But the rule has been modified, and when his deposition has been read to the jury, the opposite party may call him as his own witness. *Frink* v. *Potter*, 17 Ill. 406, and *Bradley* v. *Geiselman*, ib. 571. But where a deposition has been regularly taken, the opposite party has the right to attend and cross-examine, and failing to do so, he should not be permitted to cross-examine him as the witness of the other party. If he desires his evidence he should introduce him as his own witness, and afford the other party an opportunity of cross-examination. Having failed to attend and cross-examine the witness when his deposition was taken he waived the right to such examination. The court below

committed no error in refusing to permit the cross-examination of these witnesses.

We now come to the question upon which the case turns, and that is, whether appellants, under the law creating them a board of trustees, are liable to be sued for the injury appellee has sustained by this collision. Are they a body corporate and politic, with power to sue and be sued? If they fail to discharge their duty, and injury results therefrom, may a recovery be had against them? In the case of these appellants against Daft, 48 Ill. 96, it was held that an action could not be maintained against them for a neglect to keep the canal in repair, and from which an injury has resulted; that by the act of 1847, (Scates' Comp. 936, sec. 1,) the action is given against the State Canal Trustee. As the question is fully discussed in that case we deem it unnecessary to again discuss it at this time. That case is in point and must govern this. As this disposes of the case so effectually that another trial can not be had against these appellants, we deem it unnecessary to discuss the question whether the facts disclosed by the evidence would create any liability, even if the action could be maintained.

The judgment must be reversed and the cause remanded.

Judgment reversed.

AUGUST WALLBAUM

v

EDWIN HASKIN *et al.*

RULES OF PRACTICE—*in the Superior Court of Chicago.* The rule of practice adopted by the Superior Court of Chicago, which permits a plaintiff in any case

ex contractu, pending on an issue of fact only, or only requiring the *similiter* to be added, to bring the same to trial out of its regular order on the trial calendar, upon affidavit that he believes the defense is made only for delay, and giving five days' notice, unless it shall be made to appear by affidavit of facts in detail that the defense is made in good faith, does not contravene any law governing that court, and is within its power to adopt.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an action of assumpsit, brought in the court below, by Haskin and others against Wallbaum. The defendant pleaded the general issue, and filed his affidavit of merits. The cause was placed upon the trial calendar, and set down for trial on Friday, the 27th day of December, 1867.

On the 9th day of December, preceding the day for which the cause was set for trial on the regular calendar, one of the plaintiffs filed his affidavit that he believed the defense therein was made only for delay, and on the same day the plaintiffs gave the defendant notice that they would bring the cause on for trial at the opening of the court on the 16th day of that month, or as soon thereafter as the court would try the same.

This action of the plaintiffs was had under the following rule of the court below:

"*Ordered*, That in any case *ex contractu*, pending on an issue, or issues of fact only, or only requiring the *similiter* to be added, which is noticed for trial at any term, if the plaintiff, or an attorney or agent of the plaintiff, shall make an affidavit that he or she believes that the defense is made only for delay, the plaintiff, by giving the defendant's attorney, or the defendant, if he or she do not appear by attorney, five days' previous notice, with a copy of such affidavit, that the plaintiff will bring on said case for trial at the opening of court, on a day of such term to be specified in such notice, or as soon thereafter as the court will try the same, may proceed to a trial at the

time specified in said notice, unless it should be made to appear to the court, by affidavit of facts in detail, that the defense is made in good faith, when the case will remain, to be tried in its regular order on the trial calendar."

On the 16th day of December, the same was called for trial, on the motion of the plaintiffs, and thereupon the defendant objected to having the cause tried out of its proper order as originally set for trial on the regular calendar, insisting the rule of the court under which it was sought to bring on the trial of the cause at an earlier day, was contrary to law. The court overruled the defendant's objection, and proceeded with the trial on the 16th of December, which resulted adversely to the defendant, and he thereupon took this appeal.

Messrs. HERVEY, ANTHONY & GALT, for the appellant.

Messrs. BATES & TOWSLEE, for the appellees.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

In the case of *Owens* v. *Ranstead*, 22 Ill. 161, this court said, that every court of record has an inherent power to prescribe rules of practice, being only limited to their reasonableness and conformity to constitutional or legislative enactments—that without this power, it would be impossible to dispatch business, and delays would be interminable.

The rule in question, prevailing in the Superior Court of Chicago, has in it no quality contravening any legislation on the subject of practice in that court, but is calculated to give full effect to sec. 3 of the act regulating the practice in the circuit and common pleas courts of Cook county, approved Feb. 12, 1853, which latter court is now known and designated as the Superior Court of the City of Chicago.

That section requires that, accompanying the plea to the action, there shall be an affidavit of merits. Full effect is given to this requirement by the rule in question, and no party can be taken by surprise, as the rule provides that five days' previous notice shall be given to the opposite party, with a copy of the affidavit on which application will be made to bring on the cause for trial. To avoid the effect of this application, the opposite party has only to make affidavit of the facts in detail, that the defense is made in good faith. In this particular case, the defendant does not pretend he has any defense.

The judgment of the superior court is affirmed.

Judgment affirmed.

AUGUSTUS T. JOHNSON *et al.*

v.

ANNING O. CAMPBELL *et al.*

1. LEGISLATURE—*power of—to authorize taxation in order to refund money raised by subscription to pay bounties to volunteers.* While the legislature cannot authorize taxation, in order to raise money to be used for purposes which cannot reasonably be considered corporate, yet, it has the undoubted power to authorize taxation, for the purpose of refunding money raised to pay bounties to volunteers, and which was raised by subscription, on the faith that the money so advanced for such purpose would be refunded.

2. STATUTE—*act of January 18th, 1865—authorizing taxation to pay bounties to volunteers.* The act of January 18, 1865, authorizing taxation for the payment of bounties to volunteers, recognizes, as a binding debt, the bonds which a town may have issued to volunteers in payment of bounties and in lieu of money, the same as the fund raised by subscription for such purpose, and authorizes taxation for their payment.

APPEAL from the Circuit Court of Ogle county; the Hon. W. W. HEATON, Judge, presiding.

This was a bill in chancery, filed in the court below by the appellees, Anning O. Campbell, Franklin O. Smith and William Lockwood, against the appellants, Augustus T. Johnson, James R. Sansor, and John L. Kasier, to enjoin the collection of a tax, levied to pay indebtedness incurred on account of bounties paid to volunteers, to fill the quota of the town of Byron, and which tax was authorized by the act of January 18th, 1865, p. 100, Private Laws. Upon the hearing, the court rendered a decree enjoining the collection of the tax, to reverse which, the record is brought to this court by appeal.

Messrs. EDSALL & CRABTREE, for the appellants.

Mr. GEORGE C. CAMPBELL, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This case is substantially like that of *The People* v. *Sullivan*, 43 Ill. 413. The only difference we observe is, in that, the subscription was made under the act of February 2, 1865, p. 102, Private Laws, while in this, it was made under the act of January 18, 1865, p. 100, Private Laws. In both cases, the town was authorized to levy a bounty tax, and in both it was necessary, in order to secure the objects of the law, that money should be raised by subscription in advance of its collection by the tax. In both cases, a town meeting voted to levy a tax, and the money advanced by individuals upon the faith of such vote, was recognized by the town authorities as a binding debt, and provision made for its payment, as was expressly authorized by the act of January 18th, 1865.

While the legislature cannot authorize a town to levy a tax for the purpose of raising money to be bestowed as a private gratuity, or used for any purpose that cannot reasonably be considered corporate, on the other hand, we must recognize its power to authorize taxation in order to refund money

advanced by individuals for the public welfare, in a pressing emergency, upon an understanding for re-payment, and which the town is under the same moral obligation to repay that it would be if it had issued its bonds. Indeed, in the case before us, the town issued its bonds to such of the volunteers as did not insist upon the money, and that portion of the tax levied for the payment of the bonds is not enjoined. Yet, the moral obligation to pay the bond issued to one volunteer, and to return the money advanced to the town to secure another, is, in our judgment, precisely the same, and the legislature, in the act of January 18th, authorized the town to recognize both as binding debts, and levy a tax for their payment.

The decree of the circuit court is reversed and the cause remanded.

Decree reversed.

Franklin McVeagh

v.

The City of Chicago *et al.*

1. Constitutional law—*general rule of construction.* The presumption is, that every law passed by the legislature is in conformity with the constitution, unless the contrary be shown, and it must be a clear and palpable case, before the court will undertake to decide an act of a co-ordinate department of the government was beyond their constitutional competency to enact.

2. Taxation of national bank shares—*under the act of* 1867. The provision of the act of June 13, 1867, requiring the assessment of shares in banks to be made for the year 1867, with regard to the ownership and value of such shares on the first day of July, 1867, instead of the first day of the preceding April, does not violate the principle of equality and uniformity established by the constitution.

3. But if in making an assessment under that act, the valuation of the shares was determined on the first day of July, and the law required it should be

determined as of the first day of April, it would be necessary for the owner of the shares, calling upon a court of equity for relief, to show that he has been injured thereby—that by reason thereof, the valuation put upon them on the first day of July, was greater than they justly bore on the first day of April preceding, or that he was compelled to pay a double tax, first on the money listed for taxation on the first day of April, and again on the bank shares he purchased with this same money between that day and the first day of July.

4. Where a particular species of property has been omitted from taxation for a given year, the legislature have the power to pass a special law to cure the omission.

5. So the tax on national bank shares not having been legally assessed for the year 1867, by reason of the defective law under which it was attempted, the act of June of that year, was designed to supply the omission, and there was no want of constitutional power to enact it.

6. In assessing the shares in national banks under State authority, it is not necessary that they shall be included in the list of other personal property, so that upon aggregating the personal property, shares included, the taxable portion would be shown by what remained after the deduction for debts was made, as provided by the general revenue law. It is quite immaterial on what portion of the list these shares are found.

7. Under the act of 1867, a system of taxation for bank shares was designed, peculiar to itself, and independent of the general revenue system of the State. The only deduction allowed by the act, from the shares of each owner, is a proportionate sum for the real estate in which a portion of the capital might be invested. No deduction for debts owing by the owner can be made from the valuation of his bank shares.

8. Nor is this discrimination in not allowing a deduction from the valuation of bank shares, for debts owing by the owner, as is allowed to be made from the valuation of other personal property under the general revenue law of the State, contrary to the limitations imposed by the proviso of the 41st section of the national banking act of June 3, 1864, which provides that shares in those banks shall not be taxed under State authority "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such States." The "rate" of taxation is not affected by the different modes adopted to ascertain the taxable value of the various kinds of property.

9. Should a collector be compelled to sell the bank shares for the non-payment of taxes, under the act of 1867, and the bank refuse to transfer them to the purchaser on the books of the bank, a court of chancery, on a bill filed for such purpose, would compel the transfer.

10. Or if the taxes upon such shares remain unpaid through the dividends, as provided by this law, the State could by *mandamus* compel the officers of the

bank to appropriate the dividends, or such portions as might be necessary to pay the taxes.

11. Notice of assessment. No actual notice of the assessment of bank shares is required to be given to the owner, the act requiring only that notice shall be published in a newspaper a certain length of time.

Writ of Error to the Circuit Court of Cook county; the Lon. Erastus S. Williams, Judge, presiding.

The opinion contains a sufficient statement of the facts in this case.

Mr. Melville W. Fuller and Messrs. Mattooks & Mason, for the plaintiff in error.

Mr. S. A. Irvin, for the defendants in error.

Mr. Chief Justice Breese delivered the opinion of the Court:

This was a bill in chancery in the Cook Circuit Court, instituted by Franklin McVeagh against the City of Chicago, to restrain the collection of the taxes assessed by the authorities of that city, on certain shares of stock held by complainant in the Commercial National Bank of Chicago, on the allegation, among others, that the act of the general assembly, of June 13, 1867, was unconstitutional and void, so far as it provides for taxation in respect to bank shares for the year 1867, and that the assessment was void because contrary to the first proviso of section 41 of the National Banking Act, in these particulars, that the shares in question were not included in the valuation of the personal property of the owner, and that the assessment and tax are void, because the shares are placed in the valuation at a greater rate than other moneyed capital, no deductions being allowed for debts due and owing by the shareholders, and because the act of 1867 is contrary to the national bank law.

A demurrer was sustained to the bill, and a judgment rendered against complainant for costs, to reverse which, he has brought the record here by writ of error, assigning as error, sustaining the demurrer to the bill.

The several points made by the bill, are argued at great length, and we have given them full consideration.

The first objection implies a want of constitutional power in the legislature to enact the law. That must be shown by the party making the charge, the presumption being that every law passed by the legislature is in conformity with the constitution, unless the contrary be shown, and it must be, as this court has often decided, a clear and palpable case, before this court will undertake to decide an act of a co-ordinate department of the government was beyond their constitutional competency to enact.

The argument of counsel in support of this objection, is founded on the fact that, inasmuch as appellant's shares were not assessed on the first day of April, 1867, they could not be assessed on the first day of July thereafter, for the year 1867, for that would violate the principle of equality and uniformity established by the constitution.

An examination of the revenue law of the State, has not shown us that the shares should be assessed for taxation on the first day of April. Indeed, it would be impracticable so to do, as the assessment may require months to complete it. This assessment was for municipal, not State purposes, and if the charter of the city required the assessment to be made on the first day of April, and it was not so done, or it could not be, then it should be shown, that an injury has resulted by making the assessment on a different day.

Admit the valuation of appellant's shares was determined on the first day of July, and the law required it should be determined as of the first day of April, surely it would be necessary for appellant, calling upon a court of equity for relief, to allege and prove he has been injured thereby—that

by reason thereof, his shares have been valued too high, or that there was a difference in their value on the two specified days, being higher on the first day of July than they were on the first day of the preceding April, whereby he would be compelled to pay a greater tax. No such matter is alleged in the bill of complaint. If no injury has been occasioned by the act of which complaint is made, or omission to act in strict compliance with the law, it is certainly incumbent on complainant to show, that in his case the tax assessed against him at the time charged, violated the principles of uniformity and equality required to be observed by constitutional provisions and by decisions of this court. The great central idea of our constitution, in this behalf, as we have before said, in *C., B. & Q. R. R. Co.* v. *The Supervisors of Bureau County*, 44 Ill. 229, was equality of taxation, so that one man or corporation should not be required to pay a greater tax on the same description of property, than another in the same locality.

In what way the taxation here complained of violates this principle, is not perceived. It is not alleged or pretended that in taxing appellant's shares, a discrimination has been made to his prejudice, or that he has paid a double tax, first on the money listed for taxation on the first of April, and again on the bank shares he purchased with this same money between that day and the first day of July.

We cannot perceive wherein the act violates the constitution. It is not claimed appellant has paid any tax whatever upon the money with which he purchased these shares, nor is it shown they have been valued higher than like shares in the same institution, or that the valuation put upon them on the first day of July, was greater than they justly bore on the first day of April preceding.

It is admitted, taxation of a property owner should be by the operation of a general law affecting all classes of people, but where a particular species of property has been omitted from the taxation for a given year, where is the inhibition upon

the legislature to pass a special law to cure the omission? Such is the nature of the law in question. The tax on bank shares was not properly assessed, they were not, in fact, assessed by reason of the defective law under which it was attempted. This act was designed only to supply that omission, and we must give it effect, not being convinced of the want of constitutional power in the legislature to enact it.

The next objections are, that the sixth section of the act is void, being contrary to the limitations imposed by the proviso of the 41st section of the National Banking Act of June 3, 1864, in prescribing a mode of taxation different from that applied to other personal property, whereas the bank act requires the shares to be included in the list of the personalty of the owner delivered to the assessor for taxation, and that the shares are placed in the valuation at a greater rate than other moneyed capital, no deductions being allowed for debts due and owing by the shareholder.

The argument is, taking the objections together, as they should be so taken, having such an intimate connection, that the shares should have been included in that list, so that upon aggregating the personal property, shares included, the taxable portion would be shown by what remained after the deduction for debts was made, and that the policy of the law is that a man shall be taxed on what he is worth, at least so far as personal property was concerned.

These objections are satisfactorily answered by considering the proviso of the act of 1864, and the connection of our act of 1867, therewith.

That proviso is as follows:

"*Provided*, That nothing in this act shall be construed to prevent all the shares in any of the said associations held by any person or body corporate from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State

authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

The sixth section of our act is as follows:

"Sec. 6. All assessments of the capital stock of banks organized under the laws of this State, or of the property of such banks, made for State, county, or municipal purposes for the year A. D. 1867, by virtue of the laws heretofore in force, are hereby vacated and declared to be void and of no effect; and it is hereby made the duty of the assessors of the several counties and towns, cities or districts in this State in which such banks so organized, or in which any banks or banking associations organized under the laws of the United States, are or may be located, to assess the shareholders in the same upon the value of their shares, and to assess the real estate, if any, in which any part of the capital stock of such banks or banking associations is invested, in the same manner and subject to the same regulations, except as provided in this act, as is provided by law for the assessment of other real and personal property, in the same county or town, city or district, such assessment to be made for the year 1867, with regard to the ownership and value of such shares on the first day of July, 1867, and annually thereafter with regard to the ownership and value of the same on the day which may be specified by the laws in force concerning the assessment of other taxable personal property in this State."

The object of this section is quite apparent, being plainly expressed. Assessments before its passage had been made for revenue purposes, upon the capital stock of these banks, and the taxes were in process of collection. This act vacated the assessments, and put a stop to the collection of that tax,

and to supply the deficiency in the revenue, which would be thereby occasioned, the assessors were required to assess the shareholders in the banks upon the value of their shares. The act of Congress did not intend to prescribe a mode by which alone the State could tax the shares. That was for State legislation, under the limitations and restrictions prescribed by the act. To get at the shares, it would be proper to require them to be included in the valuation of the personal property, not that they should, but might, occupy a different column in the list. It cannot be understood to mean, as appellant's counsel insist, that it should be included in such valuation, to enable the shareholder to deduct from their value such debts as he might owe, as required by the general revenue law. To us it appears that this part of the proviso was intended merely to indicate to the assessors in making up the assessment roll, to place the value of the shares in the column in which personal property is placed separately, so as to show its separate amount.

In this particular case, the shares could not be included in the valuation of the personal property, for that had been made long before the passage of this act, and the act was intended to supply an omission, as we have before said, and could not contain such a provision. The great object intended by the proviso, was that the shares should be assessed at the place where the bank was located, and that they should not be assessed at a greater rate than should be assessed upon other moneyed capital in the hands of individual citizens.

But is the appellant entitled to the deduction he claims? for if he is not, the first objection is quite immaterial, no matter where, on what portion of the list, those shares are found. If it had been the intention of the legislature to permit a deduction, they would have used language indicative thereof, by declaring that bank shares shall be taxed like other property. Having been denied the right to tax the capital stock of the banks, the legislature declares that the shareholders shall be

assessed and taxed on the value of their shares, by which mode as much revenue would be derived as from the former exploded mode.

The language and object of the act are plain. This is the first section:

"Hereafter no tax shall be assessed upon the capital of any bank or banking association, organized under the authority of this State, or organized under the authority of the United States and located within this State; but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein in the county, town, or district where such bank or banking association is located, and not elsewhere, whether such stockholders reside in such town, county or district, or not, but not at any greater rate than is or may be assessed upon other moneyed capital in the hands of individuals in this State. And in case any portion of the capital of such bank or banking association is invested in real estate, then there shall be deducted, in making the assessment of such shares, from the value of the same, such sum as shall bear the same proportion to the value of such shares, as the assessed value of all such real estate bears to the whole capital stock of such bank or banking association: *Provided*, That nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by any such bank or banking association, but the same shall be subject to State, county, municipal and other taxation, to the same extent and rate, and in the same manner, as other real estate is or may be taxed."

The old system of taxing banks on their capital stock being exploded, this new system was devised, by which an amount of revenue would accrue, equal to that derived from taxing the capital stock. The only deduction allowed by the act, from the value of the shares of each owner, is a proportionate

sum for the real estate in which a portion of the capital might be invested.

Appellant's case is not governed by the general law, but by this act, and we look in it in vain for any sanction to the claim for deductions on which he insists. The intention of the legislature is further evident from the second section of the act, which is as follows:

"Sec. 2. There shall be kept, at all times, in the office where the business of such bank or banking association, organized under the laws of this State, or of the United States, shall be transacted, a full and correct list of the names and residences of all the stockholders therein, and of the number of shares held by each, and such list shall be subject to the inspection of the officers authorized to assess taxes or to assess property for taxation, during the business hours of each day in which business may be legally transacted; and it shall be the duty of each county, town, city or district assessor, to ascertain and report to the county clerk of his county, or the other proper officer, as a part of his return of the assessment of property, a correct list of the names and residences of all stockholders in any such bank or banking association located in his county or town, with the number and value of all such shares held by each of them respectively, showing the name of each of such banks or banking associations in which such shares are held; and such return shall also show what deduction, if any, is to be made from the value of such shares on account of the investment of any of the capital stock of such bank or banking association in real estate, as set forth in the first section of this act."

A deduction for real estate investment being specially named, excludes the idea of any other deduction. It is quite apparent that owners of bank shares, under the system inaugurated by this act, were not intended to be placed on the

same footing with owners of other personal property. The object of the act was to supply the place of a system which had been overturned by a decision of the Supreme Court of the United States in Bradley's case, and to substitute for the capital stock the full shares into which that stock was divided, without any deduction save for investments in real estate, and which was taxable as other real estate, and thus obtain from the bank and the shareholders together as much as it did before from the tax on the capital.

That a new system was devised, is further discoverable from section four:

"Sec. 4. The collector of taxes, and the officer or officers authorized to receive taxes from the collector, may, all or either of them, have an action to collect the tax assessed on any share or shares of stock owned by non-residents of this State, from the avails of the sale of such share or shares; and the tax assessed against such share or shares shall be and remain a lien thereon till the payment of said tax."

No such provision as this is found in the revenue law, nor is such an one as is contained in section five, found in it:

"Sec. 5. For the purpose of collecting such taxes, and in addition to any other laws not in conflict with the Constitution of the United States, relative to the imposition of taxes, it shall be the duty of every such bank or banking association, and the managing officers thereof, to retain so much of any dividend or dividends belonging to such stockholders as shall be necessary to pay any taxes assessed in pursuance of this act, until it shall be made to appear to such officers that such taxes have been paid; and any officer of any such bank, who shall pay over or authorize the paying over of any such dividends, or any portion thereof, contrary to the provisions of

this section, shall thereby become personally liable for all such tax, and if the said tax shall not be paid, the collector of tax where the bank is located, shall sell said share or shares to pay the same, like other personal property."

In view of this legislation, it must be apparent, that a system of taxation for bank shares was designed, peculiar to itself, and independent of the general revenue system of the State.

No deduction being allowed under this system, except for investments in real estate, the objection that the shares are valued at a greater rate than other moneyed capital of the State, falls to the ground. Value of property is one thing, and the rate at which it shall be taxed is entirely different. Rate is the proportion or per centage which property shall bear, no matter what its value. It does not vary as values vary, but is always the same. One per cent. or three per cent. on an ascertained valuation, applies to all property equally, however much the values may differ. The meaning of the act evidently is, that the rate or per centage of taxation on bank shares, shall be no greater than the rate imposed on other property. No violation of the act is shown in this regard.

This provision of the fifth section is attacked by appellant, on several grounds. We do not deem it necessary to defend it, as the remaining portions of the act would be effectual for the purposes intended, if that was stricken out, save the last clause, to which no objection has been made. Under that clause, should a collector be compelled to sell the shares for non-payment of the taxes, and the bank refuse to transfer them to the purchaser on the books of the bank, a court of chancery, on a bill filed for such purpose would compel the transfer. But on principle, we can perceive no valid objection to the section.

The State is entitled to its revenues. It has a right to use all the means, summary or otherwise, not prohibited by a

higher power, to collect them. In case of bank shares, if they are taxed and the taxes remain unpaid through the dividends as provided by this law, the State could by *mandamus* compel the officers of the bank to appropriate the dividends, or such portions as might be necessary to pay the taxes.

This question is fully discussed by the Court of Appeals of Maryland, in the case of *The State* v. *Mayhew*, 2 Gill 487, in most of the reasoning of which, and in the conclusion, we concur, and are in accordance with what we have said above.

Upon the last point made, that appellant had no notice of the assessment, it is sufficient to say, that it is not necessary he should have actual notice, the law requiring only that notice of the assessment should be published in a newspaper of the city, a certain length of time. It is not denied such notice was given.

Perceiving no error in the record, the decree dismissing the bill must be affirmed.

Decree affirmed.

FRANKLIN McVEAGH

v.

AUGUST NEUHAUS *et al.*

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

Mr. MELVILLE W. FULLER and Messrs. MATTOCKS & MASON, for the plaintiff in error.

Mr. ELLIOTT ANTHONY, for the defendants in error.

Mr. Chief Justice Breese: This case differs in no respect from the preceding case, except that in this, the assessment upon the bank shares was for State and county purposes for the year 1867.

The principles involved are the same, and the same judgment must be given, that the decree of the circuit court be affirmed.

Decree affirmed.

The Racine & Mississippi Railroad Company

v.

The Farmers' Loan & Trust Company *et al.*

1. Corporations—*bound by a parol contract made by their authorized agents.* The doctrine is well settled, that a corporation, acting within the scope of its legitimate authority, is bound by a parol contract made by its authorized agent, the same as an individual under like circumstances.

2. Statutes—*construction of act of February 10th, 1853—incorporating the Rockton & Freeport R. R. Co.—power of the company to consolidate its stock with, and place the same under the control of a corporation of another State.* Under the act of the legislature of February 10th, 1853, incorporating the Rockton & Freeport Railroad Company, said company was authorized, in event it should consolidate its stock with that of a corporation outside of this State, as it was empowered to do, to place the control of the consolidated stock under the control of the board of directors of the foreign company.

3. Corporations—*effect of a corporation of this State consolidating with one of a foreign State.* The consolidation of the stock of a railroad company created by the laws of Wisconsin, with that of one created by the laws of this State, does not constitute the corporations thus consolidating, one corporation of both States, or of either, but the corporation of each State continues a corporation of the State of its creation, although the same persons as officers and directors, manage and control both corporations as one body.

4. SAME—*a mortgage made by the company created by the consolidation, upon the property of the Illinois corporation—is the deed of the latter—and is valid.* And where, after such consolidation, by legislative act, the name of the Illinois corporation is made the same as that of the Wisconsin corporation, and a mortgage is made in the corporate name by the officers of the company as consolidated, upon the line of railroad of the Illinois corporation, such mortgage is the sole mortgage of the Illinois corporation, and is legal and valid.

5. And where, after the consolidation of these corporations, the corporation thereby created, afterwards, consolidated with another Illinois corporation, the name of which was subsequently changed by legislative act, to the same name as that of the former corporation, and the whole managed by a common board of directors, and a mortgage was made covering the entire road in Illinois, owned by the Illinois corporation: *Held*, that notwithstanding the consolidated contract with this third corporation may have been illegal, that fact could not affect the validity of the mortgage as to that portion of the property mortgaged, and not owned by such third corporation, at the time of the consolidation.

6. MORTGAGOR—*not permitted to deny his own title.* And in a suit to foreclose such mortgage, the question as to the validity of such consolidation contract cannot be raised by the mortgagor corporation. Having mortgaged the property, it will not be permitted to deny its own title.

7. The purchaser under a decree in such suit, would acquire only such title as the mortgagor corporation had power to mortgage at the time, or as it has been since recognized as having had in such way as to conclude interested parties; as neither such third corporation, nor any of its stockholders, were made parties to such suit, they could not be affected by the decree, and might afterwards assert their right to that portion of the property owned by them and included in the mortgage.

8. CORPORATIONS—*of different States—consolidating—effect of mortgage—made by the consolidated company—upon the property of either.* Where corporations, created respectively by the laws of Wisconsin and Illinois, consolidate, but in making the contract of consolidation, they fail to pursue the terms of their charters, and subsequently, by legislative act of this State, such contract is confirmed, the corporate existence of the corporation named in the act is thereby recognized as a corporation of this State, and a mortgage subsequently made in the corporate name of all the corporations, (they being the same in both States, and managed by a common board of directors) upon the property of the corporation of this State, is a valid mortgage of the latter corporation.

9. TRUSTS AND TRUSTEES—*who will be considered as a trustee.* And where a person takes the entire management and control of the corporations so consolidating, managing the same, as one company, for the better security or protection of the mortgagee, such person thereby becomes a trustee, not only for the mortgagee, but also for the mortgagor corporations.

Syllabus.

10. Same—*trustee—cannot purchase the trust fund.* And if at a foreclosure sale of the property under a second mortgage, such person, while occupying such relation, becomes the purchaser, he will be required to yield the property to the mortgagor corporation, upon being reimbursed the amount of his bid, with interest thereon.

11. And such person must also be held to account for the earnings of the property while managed and operated by him, and in a foreclosure suit upon the first mortgage, it was error for the court to decree that the right of the mortgagor corporation, to have such accounting, should depend on the redemption from the sale to such trustee under the second mortgage, within 90 days thereafter, and in default of such redemption, the mortgaged property should be sold to pay the first mortgage.

12. In such case, the decree should be, that the account be first taken and stated, and a reasonable time should be given for the redemption from the sale under the second mortgage, and for the payment of such balance as should be found due on the first mortgage debt, after deducting the net earnings of the property, and that in default of such redemption and payment being made, the property be sold in satisfaction of said first mortgage debt.

13. In such accounting, the mortgagor corporation was entitled to a credit, for the earnings of a certain line of railroad, which had been constructed by such trustee, with money furnished by the first mortgagee, and which road had been built along the line of a partially completed railroad belonging to the mortgagor corporation, which by its contiguity rendered the road of the mortgagor less valuable than it otherwise would have been.

14. The earnings of such other road must be ascertained down to the date of the decree only, as an account of the earnings or amounts to a later period, was waived, as appears by the recitals of the decree.

15. The circuit court when deciding the motion, when made, to set aside the sale of the mortgaged property under the decree of foreclosure, pending the writ of error in this cause, must treat this modification of its views as a reversal, and upon such motion, proof must be heard, as to whether the property is now held under the master's deed, by *bona fide* purchasers.

16. And when the circuit court shall have acted upon this question, either party can bring its decision before this court for review, but such question cannot, in the first instance, be brought for decision before this court.

Writ of Error to the Circuit Court of Stephenson county; the Hon. Benjamin R. Sheldon, Judge, presiding.

The facts are fully stated in the opinion of the court.

Messrs. KNOWLTON & JAMIESON, for the plaintiffs in error.

Mr. THOMAS J. TURNER, for the defendants in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

On the 17th of April, 1852, the legislature of the State of Wisconsin passed an act incorporating the Racine, Janesville & Mississippi Railroad Company, with power to construct a railway from Racine, on Lake Michigan, to the Mississippi river. The company was duly organized in November, 1852. By an act of the legislature of Wisconsin, approved June 27, 1853, the company was authorized to build a branch road to Beloit, a town on the line between Wisconsin and Illinois, and by another act, approved July 9th, 1853, the company was authorized to connect its road at Beloit with any railroad then chartered or thereafter to be chartered in the State of Illinois, and to consolidate its stock with the stock of such Illinois road, and place the road under a joint board of directors, to be chosen as the consolidating companies should agree.

The legislature of the State of Illinois, by an act approved February 10th, 1853, incorporated the Rockton & Freeport Railroad Company, with power to build a railroad "from a point on the north line of the county of Winnebago, through the village of Rockton, to Freeport, in Stephenson county." The company was authorized to consolidate its stock with that of any Wisconsin company that had been or might thereafter be incorporated by the legislature of that State, running from the terminus of said road in the direction of Lake Michigan.

On the 23d of February, 1854, these two companies entered into articles of agreement, the object of which was declared, in the concluding article, to be, "to fully merge and consolidate the capital stock, powers, privileges, immunities and franchises of the Rockton & Freeport Railroad Company,

with the Racine, Janesville & Mississippi Railroad Company."

On the 13th of February, 1855, the legislature of Illinois changed the name of the Rockton & Freeport Railroad Company, to "The Racine & Mississippi Railroad Company," and on the 31st of March, of the same year, the legislature of Wisconsin changed the name of the Racine, Janesville & Mississippi Railroad Company, to "The Racine & Mississippi Railroad Company."

We will now state the facts in regard to a third road which ultimately was consolidated with the Racine & Mississippi.

On the 21st of January, 1851, the Savanna Branch Railroad Company was organized under the general railroad law of Illinois, for the purpose of building a road from Savanna, on the Mississippi river, in an easterly direction, to intersect the Galena & Chicago Union Railroad, at a point in Stephenson county, not exceeding 15 miles from the town of Freeport. On the 12th of February, 1851, the legislature passed an act, authorizing the company to build the proposed road, and, for that purpose, to condemn private property, thus recognizing the existence of the corporation. On the 23d of January, 1856, this company entered into articles of agreement with the Racine & Mississippi Railroad Company, by which its stock was consolidated with the latter company, and a majority in interest of the stockholders of the Savanna company, gave their written ratification of the articles. On the 14th of February, 1857, the legislature of Illinois passed an act changing the name of the Savanna Branch Railroad Company, to "The Racine & Mississippi Railroad Company," and confirming and declaring legal and binding the acts of consolidation entered into between the Rockton & Freeport company, and the Racine, Janesville & Mississippi company, and those between the Savanna Branch company and the Racine & Mississippi Company.

Prior to this time, and on the 1st of September, 1855, the Racine & Mississippi Railroad Company had executed and delivered to the Farmers' Loan & Trust Company, a corporation existing in the State of New York, 680 bonds of $1,000 each, payable to said Loan & Trust Company or bearer, and to secure their payment, had executed a mortgage upon so much of their road as was situated in Wisconsin, extending from Racine to Beloit.

Subsequent to the above named act of confirmation, and on the 24th of April, 1857, the Racine & Mississippi Railroad Company executed to the same Farmers' Loan & Trust Company 700 additional bonds of $1,000 each, and on the same day, to secure the payment of said bonds, executed to said Loan & Trust Company a mortgage upon all its road in the State of Illinois, extending from Beloit, on the Wisconsin line, to Savanna, on the Mississippi river. The mortgage recited that the company was engaged in the construction of a railroad from Racine to Beloit, in Wisconsin, and from Beloit to Savanna, in Illinois. These bonds and mortgage bore date June 2d, 1856, but the bonds were not sold, nor the mortgage acknowledged, until April 24th, 1857, after the passage of the confirmatory act. It is to foreclose this mortgage that the present suit is brought.

It should be further stated, the Farmers' Loan & Trust Company, on the 3d of December, 1858, filed their bill in the circuit court of the United States for the district of Wisconsin, against the Racine & Mississippi Railroad Company, to foreclose the mortgage given on that portion of the road situate in Wisconsin, to secure the issue of bonds first above named, and on the 10th day of May, 1859, pending that suit, the railroad company executed to the Loan & Trust company a deed of surrender of the entire road. The road was then fully completed in Wisconsin, and about 20 miles were finished in Illinois. After taking possession, the Loan & Trust company proceeded to complete the road to Freeport, as it was authorized

to do by the deed of surrender, and it was opened for business on the 1st of September, 1859, having remained from that time to the present under the undisputed control of the Loan & Trust company. George A. Thomson, a party in this suit, acted as agent of said Trust company, in the management and control of said road.

After the execution of said deed of surrender, and in pursuance of its terms, a decree of foreclosure was pronounced in the then pending suit, giving the railway company five years from the completion of the road to Freeport, in which to redeem said property, and providing that if no redemption should be made, the court should proceed to make such other and further decree in the premises as might be necessary. No redemption having been effected, on the 31st of March, 1865, the Farmers' Loan & Trust Company filed their petition in said court, setting out in full their disbursements and receipts, and praying a decree of sale. An account was stated by the master in chancery, which was approved by the court, and a decree of sale was pronounced, under which George A. Thomson became the purchaser of the Wisconsin division of the road.

In order to comprehend certain questions arising upon the record, it is necessary to state some further facts.

On the 27th of June, 1857, the Racine & Mississippi Railroad Company executed to Morris K. Jesup and Curtis B. Raymond, 700 bonds for $1,000 each, and to secure their payment, also executed a mortgage upon the entire line of road, from Racine to Savanna. This mortgage was made expressly subject to the above named mortgages to the Loan & Trust Company on the Wisconsin and Illinois divisions of the road. On the 26th of December, 1859, Jesup and Raymond filed a bill in the circuit court of Walworth county, in the State of Wisconsin, to foreclose this mortgage, and the Wisconsin portion of the road was subsequently sold, under a decree rendered in said suit, to said Morris K. Jesup, for $270,000. Jesup

subsequently conveyed the title thus acquired, to Richard Irvin and George A. Thomson, and Irvin afterwards conveyed to Thomson. On the 2d of December, 1863, Jesup and Raymond filed their bill in the circuit court of the United States, for the northern district of Illinois, to foreclose their mortgage upon that portion of the road situate in Illinois. The court found the sum of $859,362 to be due said Jesup and Raymond, and pronounced a decree of sale, under which the Illinois division of the road was sold and conveyed by the master in chancery to George A. Thomson for $70,000, and the sale was approved by the court.

That portion of the road running from Freeport westward to the Mississippi, was never completed in the name of the Racine & Mississippi Railroad Company, but on the 24th of February, 1859, the legislature of Illinois incorporated the Northern Illinois Railroad Company, with power to build a road from Freeport to the Mississippi. The company was organized in 1860, and George A. Thomson, then managing the Racine & Mississippi road, as agent of the Loan & Trust company, and therefore, under the deed of surrender, occupying a fiduciary relation to the Racine & Mississippi Company, subscribed to all the stock of the Northern Illinois Railroad Company, except $3,800, and became the president. He then proceeded to build the road from Freeport to Savanna, in the name of the Northern Illinois Railroad Company, at no place diverging more than three miles from the track of the Racine & Mississippi Company, and in places occupying its very track, which had been partially graded. This road was built with money obtained from the holders of the bonds of the Racine & Mississippi Company, secured by the mortgages to the Loan & Trust Company.

After the road was completed, it was leased to the Loan & Trust Company, and operated by it, through Thomson as its agent, in connection with the line of the Racine & Mississippi road.

Such are the substantial facts necessary to a comprehension of this case.

To this bill of foreclosure, which was filed in the circuit court of Stephenson county, on the 31st of December, 1864, the Racine & Mississippi Railroad Company filed their answer, and subsequently filed a cross-bill and an amended cross-bill, to which it made George A. Thomson and the Northern Illinois Railroad Company parties. It prayed in the cross-bills, not only for the cancellation of the bonds and mortgage given to the Loan & Trust Company, upon which this suit is brought, and of the sale and deed to Thomson under the foreclosure of the Jesup and Raymond mortgage, but also that the court should decree the Northern Illinois Railroad to have been built in violation of its rights and franchises, by parties occupying a fiduciary relation towards itself, and that an account might be taken with said railway company, and such relief given as the case might require. Answers were filed to the cross-bills, and the original cause and the cross-cause having been brought to issue, and a great amount of proof taken, they came to a hearing, and the court pronounced a decree directing a sale of the road for the amount due upon the bonds, and authorizing the Racine & Mississippi Railway Company to redeem from the sale to Thomson, under the Jesup and Raymond mortgage, by repaying the $70,000 which he had paid the road, and interest thereon, and also directing an account to be taken with the Northern Illinois Railroad Company for the benefit of the Racine & Mississippi Company, provided the latter should first redeem from Thomson by paying the $70,000 and interest, within 90 days from the decree. It was further decreed, that if the Racine & Mississippi Company should fail to redeem within the 90 days, the Northern Illinois company need not come to an account, and the road of the Racine & Mississippi Company should be sold at once in payment of the amount found by the court to be due upon the Loan & Trust Company bonds, but should redemption be made

from Thomson within the 90 days, no sale should take place until the statement of an account by the master with the Northern Illinois Railroad Company, and the net profits earned by said company should apply as a credit on the bonds secured by the mortgage held by the Loan & Trust Company, and produced in this suit.

To reverse this decree, the Racine & Mississippi Railroad Company has prosecuted a writ of error.

It is urged by the counsel for plaintiff in error, that the consolidation contracts above named were void—that they were not aided by the confirmatory act of the legislature, and that, therefore, the corporation known as the Racine & Mississippi Railroad Company is merely a Wisconsin corporation, and has had no legal existence in Illinois. It is urged that this mortgage is merely a mortgage made by a Wisconsin corporation upon property in Illinois, to which it has no title, and over which it can rightfully exercise no control. It is further urged, that, even if the contracts of consolidation were not void, and if the Racine & Mississippi Railroad Company had a legal existence in Illinois, nevertheless, it had no power to make this mortgage. These objections we will consider.

It is first insisted that the contract between the Rockton & Freeport Railroad Company and the Racine, Janesville & Mississippi Railroad Company was void, because not under the corporate seal; but the ancient doctrine of the common law, that a corporation could speak and act only by its corporate seal, has long since been exploded, and it is now too well settled, in this country, to need any citation of authorities, that a corporation, acting within the scope of its legitimate authority, is as much bound by a parol contract made by its authorized agent, as a natural person would be under like circumstances. 2 Kent, 288. In this case, the Rockton & Freeport Company, by a resolution of its board of directors, had expressly authorized this contract to be made, and it was subsequently carried into complete execution by both

companies, and thus ratified as completely as ratification could be made.

It is further urged, that the Rockton Company was authorized, by its charter, to consolidate its stock only on condition that the consolidated stock should be placed under the control of the board of directors of the Rockton company, whereas, by the contract actually made, the control was given to the directors of the Wisconsin company. The Rockton and Freeport company did not thus construe its charter, for, in the third article of the contract in which the control is given to the Wisconsin board, reference is especially made to the 10th section of the charter as giving authority so to do; and on reference to that section, we are of opinion the company was correct in its construction. That section is as follows:

"SECTION 10. It shall be lawful for the said company to unite with any other railroad company which may have been, or may hereafter be, incorporated by the state of Wisconsin, and running from the terminus of said road in a direction towards Lake Michigan, and to grant to such company the right to construct and use all or any portion of the road hereby authorized to be constructed; also the right to purchase or lease, all or any part of said road; also the right to sell, lease or convey the same to said company, or consolidate its stock therewith, and place the management and control of the same under said board of directors, upon such terms as may be mutually agreed upon between the said railroad companies."

It will be perceived that this entire section is very awkwardly worded, but we are of opinion the company was correct in construing the concluding paragraph as designed to authorize it to place the management of its stock under the board of directors of the Wisconsin company, with which it might consolidate, if it should think proper so to do. The phrase, "*said* board of directors," is improperly used, as no board

had been mentioned, but we construe it as referring to the Wisconsin company mentioned in the same clause of the sentence.

These are all the objections to the contract between the Rockton and Wisconsin companies, we deem it necessary to notice.

The contract of consolidation between the Savanna Branch Railroad Company and the Racine & Mississippi Company, was made under the authority of the general law in regard to the consolidation of the stock of railway companies, approved February 28, 1854. That act authorizes companies in this State, where roads intersect by continuous lines, to consolidate their stock, and also to consolidate with companies out of the State, when their lines should connect.

It is objected by counsel for plaintiff in error, that this contract of consolidation was made between the Savanna Branch Company on the one side, and the Racine & Mississippi Railroad Company on the other, by a contract which describes the latter company as "a corporation existing under an act of the legislature of the State of Wisconsin," and that the lines of the two companies did not connect, and therefore they could not consolidate. But "*falsa demonstratio non nocet.*" It must be remembered, that prior to this date, the legislature of Illinois, acting upon the consolidation contract between the Rockton & Freeport Company and the Racine, Janesville & Mississippi Company, had changed the name of the former to the Racine & Mississippi Company, and the legislature of Wisconsin had done the like for the latter company. The stock of the two companies had been consolidated under a common board of directors, and with a common name, and it was with this board of directors that the contract of the Savanna Branch Company was made. It is wholly immaterial that the contract described the Racine & Mississippi Railroad Company as a corporation existing under the law of Wisconsin. It existed equally under the laws of Illinois, and

the board of directors who made the contract of consolidation, represented, in so doing, a corporation deriving its existence from the laws of Illinois, as well as one deriving its existence from the laws of Wisconsin. It is immaterial that the contract gave only a partial description of the source of their authority, and it is idle to claim that they intended to contract only for the Wisconsin corporation. A separate consolidation with the stock of the Wisconsin company was impossible, because the stock of that company had already been consolidated with that of the Illinois company of the same name. It was with the consolidated stock of these two companies that the stock of the Savanna road was intended to be consolidated by this contract, and this intent was, in fact, carried into execution.

But it may be said, even if the contract with the Savanna company should be considered as having been made as much with the Racine & Mississippi company of Illinois, as with the Racine & Mississippi company of Wisconsin, it was illegally made, because of a non-compliance with the requirements of the statute, pointing out the mode by which Illinois companies may consolidate with each other.

We do not propose to discuss this question, for it is clear, so far as concerns the right of the Loan and Trust company to a foreclosure of its mortgage, it is wholly immaterial whether this contract with the Savanna company was executed in compliance with the requirements of the statute or not. We have already stated there was in existence, when this mortgage was made, an Illinois corporation under the name of the Racine & Mississippi Railroad Company, and we have held this corporation to have been legally constituted, by the contract between the Freeport & Rockton company with the Wisconsin company, and by the subsequent act of the legislature, changing the name of the old corporation to that of the new. The existence of this corporation was wholly independent of all contracts with the Savanna company. With

this corporation the stock of the Savanna company was subsequently consolidated, as a matter of fact, and this mortgage was made, covering the entire road. Now, suppose this consolidation to have been illegal. That surely would not affect the validity of the mortgage as to so much of the road as the Racine & Mississippi company rightfully owned. Its mortgage would certainly be good to the extent of its own road, from Beloit to Freeport, and whether it created a valid lien over the road from Freeport to Savanna, is a question which the courts must be prepared to decide whenever called upon by the original owner of said road, the Savanna Branch company, or by any stockholder therein, but which certainly, in this proceeding, is a question which the Racine & Mississippi Railroad Company can not raise. Whether it had an interest in the road from Freeport to Savanna, subject to mortgage or not, it assumed to have, and made a mortgage upon it, and whatever interest it had, the mortgagee is entitled to have sold. If the contract of consolidation with the Savanna company was defective in the beginning, and if the defects have not since been cured, that company, or its stockholders, may assert their right to said road, whenever they shall think proper, and they will not be prejudiced by the decree in the present case, because neither that original company as a corporation, nor its individual members, are parties to this suit. All that the purchaser under a decree in this suit will acquire at the sale, will be such title as the Racine & Mississippi company had power to mortgage at the time, or as it has been since recognized as having had in such way as to conclude interested parties. But the Racine & Mississippi company cannot be permitted to set up, as a defense to a bill of foreclosure, that it had no title to the property which it has itself mortgaged. In such a proceeding the mortgagor is not permitted to deny his own title. *Barbour* v. *Haines*, 15 Wend. 618; *Dew* v. *Van Ness*, 5 Halstead, 102.

It may also be remarked, that the argument of counsel for plaintiff in error, that the consolidation contract with the Savanna company was illegally made, is wholly inconsistent with the claim made in the cross-bill, and upon which relief was granted in the decree, that the building of the road from Freeport to Savanna, by the Northern Illinois company, was a violation of the rights of the Racine & Mississippi Company. The latter company had no rights west of Freeport, except as they were acquired by a consolidation with the Savanna company. Practically, it would seem to be for the interest of the Racine & Mississippi company to have the contract with the Savanna company pronounced valid, and its right to an account against the Northern Illinois company thus established, since it has itself never built the road westward from Freeport, and there is nothing to be sold in any event, upon the line of the road between Freeport and Savanna, under a foreclosure decree, except a naked and probably worthless franchise.

But there is another view of this branch of the case, similar in principle to that just presented, but assuming that both contracts of consolidation were void, which we deem too important to pass over in silence. As already stated, the legislature subsequently confirmed both contracts, and changed the name of the Savanna company to the Racine & Mississippi Railroad Company, as it had already changed that of the Rockton company. We shall not now stop to consider to what extent the legislature can cure defects in the contracts of corporations. It is sufficient for the present purpose that the legislature, by this act, recognized the Racine & Mississippi Railroad Company as an Illinois corporation created by the merger or consolidation of what had been the Rockton & Freeport company with the Savanna Branch company. Even, then, if both contracts of consolidation had been beyond the power of these companies to make, yet those contracts, and their practical execution by the companies, united to the

confirmatory act of the legislature, gave to the Racine & Mississippi Railway Company at least a colorable legal existence as an Illinois corporation. That it was a corporation *de facto*, can not be denied, as the stock of the old companies had been exchanged for the consolidated stock of the Racine & Mississippi company, and this company was in full possession and control of the road, and proceeding in its construction without a whisper, so far as appears, either on the part of any member of the original corporations, or of any other person, that it was not the rightful owner.

In this condition of affairs, this company, having a corporate name which the legislature had given it, claiming to be a legal corporation, and having, even if the articles of consolidation had been illegal, at least a colorable right to make such claim, controlling and building a railway as an organized corporation, and asserting the right to condemn land for its corporate purposes, issues its bonds to the amount of seven hundred thousand dollars, and sends them on the markets of the world. To secure their payment it issues a mortgage upon the road it claims to own, and is engaged in building, and, in both bonds and mortgage, describes itself as a corporation existing under the laws of Wisconsin and Illinois. The bonds go into circulation, and the money which has been received for them passes into the treasury of the company, and is expended upon the construction of the road. In process of time, the coupons upon the bonds are left unpaid, and the holders come and demand their money. To this demand the company replies that, although it issued the bonds and mortgage as a corporation, and thus procured the money, yet it was not a legally constituted corporation, and therefore will not pay the money, but will retain the road.

The doctrine of equitable estoppel has so often been expounded by the courts that it needs neither definition nor the citation of authority. In our judgment a clearer case than this for its application has rarely arisen. We are not

saying that a corporation is estopped by its bonds and mortgage from raising the question as to whether, in making them, it was acting within its chartered powers. The question whether the mortgage now under consideration was within the power of the company to make, we shall presently consider. But we do say, that where a company has issued its bonds and mortgage under the circumstances above detailed, the courts of every civilized country must hold it estopped from denying its own corporate existence, for such a defense is repugnant to every sentiment of justice and good faith. That this doctrine of equitable estoppel, or estoppel *in pais*, by which a person who has represented to another the existence of a certain state of facts, and thereby induced him to act on the faith of their existence, is concluded from averring against such person and to his injury that such representations were false, is as applicable to corporations as to natural persons, will hardly be denied. *Hall* v. *Mut. Fire Ins. Co.*, 32 N. H. 297, and *Zabriski* v. *Columbus and Cin. R. R. Co.*, 23 Howard, 391.

The views we have here set forth are in harmony with those expressed by us in the case of *Mitchell* v. *Deeds*, *post.* p. 416, in which the validity of certain notes given to this same corporation was under consideration. We there held that irregularities in the consolidation, the stock having been in fact consolidated, could not be set up as a defense in a suit brought upon notes given to the Racine & Mississippi Railroad Company, and we might have contented ourselves with a mere reference to that case, in regard to some of these questions, if counsel had not pressed upon us so earnestly a reconsideration of the views there expressed.

It is urged, however, by counsel for plaintiff in error, that admitting the corporate existence of the plaintiff in error under the contracts of consolidation, and as an Illinois corporation, this mortgage was nevertheless illegal, because the Rockton and Freeport company, by its original charter, was

authorized to borrow money only to the amount of $225,000, which was the amount of its stock, and the Savanna company, it is insisted, was not authorized to make a mortgage at all, as it was incorporated under the general law, which gave no authority to mortgage. But this implied prohibition upon the power of the Rockton & Freeport company certainly had no application to the Racine & Mississippi company, which grew out of the consolidation with the Wisconsin company, as is evident from the third section of the general law in regard to consolidation. Gross' Digest, 532. The power to make the mortgage under this statute, taken in connection with the 3d section of the act of February 12th, 1855, entitled "An act to enable railroad companies to enter into operative contracts and to borrow money," Gross' Digest, 548, we regard as so clear that it is only necessary to refer to these laws.

We have thus far in this opinion treated the mortgage in question as made by the Racine & Mississippi Company of Illinois, while the counsel for plaintiff in error treats it as made by the Racine & Mississippi Railroad Company of Wisconsin, and this error, as we consider it, pervades the whole of his argument in regard to the validity of the mortgage.

Our view of the effect of the consolidation contract between the Rockton company and the Wisconsin company, which we hold to have been legally made, is briefly this. While it created a community of stock and of interest between the two companies, it did not convert them into one company, in the same way, and to the same degree, that might follow a consolidation of two companies within the same State. Neither Illinois nor Wisconsin, in authorizing the consolidation, can have intended to abandon all jurisdiction over its own corporation created by itself. Indeed, neither State could take jurisdiction over the property or proceedings of the corporation beyond its own limits, and, as said by the court in *The O. & M. R. R. Co.* v. *Wheeler*, 1 Black, 297, a corporation "can have no existence beyond the limits of the State or sovereignty

which brings it into life and endows it with its faculties and powers." In the same case the court say that a corporation cannot be created by the co-operating legislation of two States so as to be the same legal entity in both States, and where two States have each created a corporation with the same name, for the same purposes, and composed of the same natural persons, it must nevertheless be considered as a distinct corporation in each State. See also *Farnum* v. *Blackstone Canal Corporation*, 1 Sumner, 47.

The counsel for plaintiff in error urges upon us the authority of this case, but draws from it the mistaken inference, as we regard it, that even if the contract of consolidation between the Rockton company and the Wisconsin company was legally made, nevertheless "each retained its former existence, identity, rights, franchises, powers and privileges." If such had been the fact, the consolidation would have been practically a nullity. But the contract of consolidation, and the subsequent legislation, created substantially a new corporation with a new name, but such corporation, in a legal point of view, was and has remained a distinct corporation in each State, though the two have a common name, common stock, and a common board of directors. There is a Wisconsin corporation under the name of The Racine & Mississippi Railroad Company, and there is an Illinois corporation of the same name, and the original corporations in each State have been transmuted into these.

We have remarked, that counsel for plaintiff in error insist the mortgage in question should be regarded as solely the mortgage of the Wisconsin corporation, and is, therefore, void. But why should it be so regarded? As there was a Racine & Mississippi Railroad Company in each State, and both companies had a common board of directors, a common seal, and consolidated stock, when we find a mortgage executed in this corporate name, by authority of the board of directors, and conveying only the property of the Illinois corporation, can

we have any doubt in what capacity the board of directors were intending to act? Would it not be the veriest trifling with good faith and the rights of creditors, to permit such board to say they were acting in behalf of the Wisconsin corporation, and therefore their act was null? It would be a melancholy administration of justice that would suffer such a defense. In describing the mortgaging party as a corporation existing under the laws of Wisconsin and Illinois, the scrivener who drew the mortgage fell into the very natural error of supposing that there was one corporation for both States, but this did not vitiate the mortgage. We must look at the intent of the parties, and about that there can be no doubt. The mortgage covers the road in the State of Illinois, belonging to the Racine & Mississippi Railroad Company, a corporation of this State. It is executed by the authority of the board of directors of that company, and bears its corporate seal. Does the fact that there is an allied company in Wisconsin, with the same name, seal and directors, throw any reasonable doubt upon the transaction?

From what we have said, it will be seen, we hold there is no error in that part of the decree which recognizes this mortgage as a valid lien.

The counsel for the plaintiff in error further insist, that the court should have set aside the sale under the Jesup and Raymond mortgage, without requiring it to pay the $70,000 which the purchaser, Thomson, paid at the sale, and interest thereon. But in requiring this payment, the court committed no error. The court held Thomson to occupy such a fiduciary relation to the plaintiff in error, that he could not purchase and hold the road against the will of the company. But the rule in such cases is, that the party claiming the benefit of the purchase must refund to the purchaser his outlay. Hill on Trustees, p. 539, and cases cited in notes.

As to the charge of fraud in the decree in favor of Jesup and Raymond, the proof of a fraudulent agreement, and of

Thomson's complicity therein, is so vague and unsatisfactory as to furnish no ground for holding the sale a nullity. It is urged that nothing was, in fact, due on that mortgage, but that question was settled by the decree of the federal court.

It is, however, insisted by the counsel for plaintiff in error, that the circuit court of the United States, for the northern district of Illinois, in which the decree was rendered, had no jurisdiction, as the complainants, Jesup and Raymond, were not citizens of Illinois, and it is urged the defendant was a corporation of Wisconsin. What we have already said, disposes of this question. That mortgage, it is true, unlike the one under consideration, covered both the Wisconsin road and the Illinois road. But it was the same, in legal effect, as if by the contract of consolidation a separate board of directors and a separate organization had been retained for each road, and the proper officers of both roads had united in the execution of the mortgage, under the corporate seal of each company. No one would question the validity of such a mortgage, and this is the same thing in substance. Both roads are mortgaged by authority of a board of directors which acts for each road, and the mortgage is the joint instrument of both the Wisconsin and Illinois companies. When the mortgagees sought to enforce their lien against the Wisconsin road, they proceeded in the courts of that State against the Racine & Mississippi company as a corporation of Wisconsin, and when they enforced it against the Illinois road, they proceeded in the federal court of this district against the Racine & Mississippi company of Illinois.

In dismissing this question of consolidation, it may be remarked, that where continuous lines of road, passing through different States, are consolidated by legislative authority, as we believe is not unfrequently the case, although the consolidated company must, from the very nature of a corporation, be regarded as a distinct entity in each State, yet the objects of consolidation would be very liable to be defeated, unless the

entire line should be placed under one board of directors. The principle that a single corporation cannot be created by the joint legislation of two States, while an irresistible inference from the established law in regard to corporate bodies, is nevertheless a technical and abstract principle, and when adjoining States authorize consolidations, as in the present instance, and the consolidated lines are placed under a common board, with a common name and seal, such board will, naturally, act as if the consolidated lines made but one company, and when their contracts assume that form, the courts must, for the protection of the public, and to enforce good faith, hold, as we have done in this case, that the contract is to be construed as made by the corporation of each State in which the subject matter of the corporation lies; *ut res magis valeat quam pereat.*

It is also insisted, that the plaintiff in error, being in possession under the deed of surrender, could not maintain a bill for foreclosure and sale. No authority is cited for this position, and in our opinion there is no good reason for such a rule.

There is, however, one error assigned, for which the cause must be remanded. We have already stated the circuit court found that the Northern Illinois Railroad had been built by Thomson, with money furnished for that purpose by these bondholders, while he and they occupied a trust relation to plaintiff in error, and that this was done in violation of the trust, and to the injury of plaintiff in error. The court thereupon decreed that the plaintiff in error was entitled to a credit upon its bonds for the net profits of this road, and directed that an account be stated by the master, provided the plaintiff in error redeemed from the sale to Thomson, under the second mortgage, within 90 days, but that no account should be taken in case the redemption was not made.

The directions in the decree, as to the mode in which the account should be stated, were consented to by counsel for

plaintiff in error, in open court, as appears by the face of the decree, and we have not, therefore, examined the questions made upon that portion of the decree. But there was no consent that the taking of the account should be made to depend on redemption from the sale to Thomson within 90 days, and in this provision of the decree we think there was error. Counsel for defendant in error seek to justify it, on the ground that the sale and deed to Thomson, cut off all the rights of the railroad company, unless it redeems. But such sale and deed did not affect its rights as to the profits of the Northern Illinois company, which accrued prior to the deed from the master to Thomson, and the violation of the trust having been found by the court, the right to a credit for this portion of the profits would be wholly independent of redemption.

But we think further, in regard to the profits which have accrued since the deed to Thomson, admitting the railway company would have no right to them if it should not redeem, it was unreasonable, in view of the relation which Thomson sustains to the different parties to this record, that it should be required to redeem in the dark, by paying to Thomson a large sum of money before being permitted to know how much it must pay the Loan & Trust company, in order to make its first redemption effectual, and save the road. There would have been no hardship to Thomson in having the account taken before the time for redemption should expire, except a little delay, of which he has no right to complain, in view of the position he occupies. But for the consent given to that portion of the decree directing the application of the net profits, it would be a question whether they should not first be applied to the payment of the amount due Thomson. That part of the decree, however, is not before us.

The court should have directed the account to be taken to the time when Thomson obtained his title, and from that date to the taking of the account. The profits during the first period should have been applied as directed in the decree,

independently of redemption from the sale to Thomson, and those of the second should be made to depend upon redemption, but a reasonable time should be given to redeem, after their ascertainment.

The cause will be remanded, with directions to the court to modify its former decree, in conformity with this opinion.

The costs of this court will be taxed against the defendants in error.

Decree modified.

Subsequent to the filing of the foregoing opinion, further action was had in the case, as indicated in the following additional opinion:

PER CURIAM: Since the foregoing opinion was filed, the counsel for plaintiff in error have presented a further record, showing that the road has been sold, under the decree of the circuit court rendered herein, and he asks this court to direct the circuit court to set such sale aside. This is resisted by the counsel for the defendants in error, and affidavits are filed for the purpose of showing that the road has passed into the hands of innocent purchasers, for a valuable consideration.

It is apparent, that this question cannot be brought before us in this method. The motion must be made and decided in the circuit court, where the evidence can be heard, and when that court shall have acted, either party can bring its decision before this court for review.

It is, however, proper to say, that although in our opinion already filed, we have modified and not wholly reversed the decision of the circuit court, yet that modification is of such a character, that for the purpose of deciding this motion, when

it shall be made, the circuit court should consider the decree as having been reversed.

The counsel for defendants in error has, on their part, moved for an amendment in the last paragraph but one of the opinion. As it now stands, the court is directed to take the account against the Northern Illinois Railroad Company, to the time when Thomson obtained his title, and from that date to the time of taking the account. But our attention is now called to the fact, that the decree shows the parties consented the account should be taken only to the date of the decree, and this is not denied by the counsel for plaintiff in error. The circuit court will, therefore, take the account as against the Northern Illinois Railroad Company only to that date.

It is urged, however, in behalf of the defendants in error, that the account against the Farmers' Loan & Trust Company, in regard to the profits of the other portion of the road operated by said company, which account was brought down to the date of the rendition of the decree, should now be brought forward to the time when a new decree shall be rendered. On the other hand, it is claimed that such new accounting should not be required until the plaintiff in error has redeemed from the sale to Thomson, and that in no event should it be brought down to a later date than the date of the master's deed, made under the decree and sale in this case. We are of opinion the plaintiff in error has a right to have the account stated before effecting a redemption from Thomson, and whether it shall be brought down to the time of stating the account, or shall stop at the date of the master's deed under this decree, will of course depend upon whether the court shall set said sale and deed aside.

THE NORTHERN ILLINOIS RAILROAD COMPANY *et al.*

v.

THE RACINE AND MISSISSIPPI RAILROAD COMPANY.

1. COSTS IN CHANCERY—*at what stage of the cause they may be awarded.* Where in a suit in chancery to foreclose a mortgage, a decree is rendered which settles the rights of the parties and directs a sale of the premises, but leaves the question of costs undisposed of, and the whole case stands over to await the report of the master, the parties being retained in court in view of further probable action in the case, it is competent for the court to require the costs to be taxed at the term subsequent to that at which such decree is rendered.

2. SAME—*award of costs in chancery—discretionary.* The awarding of costs in chancery cases, is a matter of discretion with the court, which this court will rarely interfere with. *Frisby* v. *Ballance*, 4 Scam. 300, and *Blue v. Blue*, 38 Ill. 19.

WRIT OF ERROR to the Circuit Court of Stephenson county; the Hon. BENJAMIN R. SHELDON, Judge, presiding.

The opinion sufficiently states the case.

Mr. THOMAS J. TURNER, for the appellants.

Messrs. KNOWLTON & JAMIESON, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This is a writ of error, brought by The Northern Illinois Railroad Company, to reverse a part of the decree in regard to costs rendered in the case of the Racine and Mississippi Railroad Company against The Farmers' Loan and Trust Company, 49 Ill. 331. It will be seen, by reference to the opinion filed in that case, *ante* page 331, that The Northern Illinois Railroad Company was properly taxed with costs; nor do we think, as claimed by counsel for plaintiffs in

error, that this company was out of court by the decree of sale in that case, so as to prevent the taxation of costs against them at the subsequent April term. By the decree of the December term, the court had settled the rights of the parties as to the subject matter of the controversy, and given time for redemption, without disposing of the question of costs as to The Northern Illinois Railroad Company, and the whole case stood over until the next term waiting the report of the master, who was directed to report his proceedings under the decree of sale. There is nothing in the decree of the December term dismissing any of the parties out of court, and in view of the fact that further action of the court would probably become necessary as to all the parties, it was most proper to retain them in court.

It is urged that it will be impossible for the clerk to tax the costs in the manner directed by the decree. It may be difficult to tax them with perfect accuracy, and if the clerk finds these difficulties insuperable he will so report to the court and ask further directions. But the supposed difficulty constitutes no reason for our changing the order. This court rarely interferes with the action of the circuit court in the award of costs in chancery cases. It is generally left to the discretion of that court. *Frisby* v. *Ballance*, 4 Scam. 300, and *Blue* v. *Blue*, 38 Ill. 19.

The order in regard to costs is affirmed.

Decree affirmed.

Syllabus.

FRANCES B. NICOLL

v.

RICHARD MASON.

1. TRUSTS—*of estate conveyed in trust, whether realty or personalty.* Where, by an agreement between the parties to an undertaking, a portion were to furnish the capital, and the other parties, as agents in the joint undertaking, were to invest it in lots in the city of Chicago, to be bought and sold on speculation for their joint use and benefit, and those furnishing the capital were, at the expiration of the time to which the joint undertaking was limited, to have the capital, so furnished and invested, returned to them, together with a stipulated annual interest, which was first to be deducted from the proceeds of the undertaking, and the remainder to be equally divided among the parties so interested: *Held*, that the resulting estate, in the property so bought and sold, being an interest in the profits merely, was of the nature of personalty.

2. But if the lots so purchased are not sold, but, by consent of all the parties, are conveyed by the purchasing agents to one of the beneficiaries, in trust for all, by such conveyance the beneficiaries are invested with an equitable estate of inheritance, and the estate is thereby changed from its character as personalty to that of realty, and invested with all its incidents.

3. If, however, the purchasing agents, as the *cestuis que trust*, convey the land, by consent of all the beneficiaries, to one, in trust for all, expressly limiting the power of such trustee to a sale of the land and division of the profits, the character of the estate would not be changed by such conveyance, but would still remain as personal estate in the beneficiaries of the trust.

4. CHANCERY—*of reforming a deed, or declaring a trust.* A court of chancery will not, after a long lapse of years, interfere to reform a deed, or declare a trust, except upon the most positive and satisfactory evidence of the intention of the parties at the time the deed was executed or trust created.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

The facts in this case are fully stated in the opinion.

Mr. J. A. CRAIN and Mr. F. B. PEABODY, for the appellant.

Messrs. WILSON & MARTIN, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that in the year 1835, Charles Butler, Edward A. Nicoll, William Bard and seven other persons, all residing in the city of New York, united with Kinzie & Pearson, of the city of Chicago, in a speculation in western lands and real estate. It was agreed that the persons residing in New York should each advance the sum of $5,000, making an aggregate sum of $50,000, which Kinzie & Pearson were to invest in western lands, sell the same, and re-invest the proceeds in other real estate at their own discretion, having the entire control of the enterprise, but were to charge nothing for their expenses. The arrangement was to cease on the 1st day of July, 1841, and no purchases were to be made after the 1st of July, 1839, and, if practicable, the lands were to be sold before the time limited for the termination of the arrangement expired. The advances were to be refunded, with seven per cent. interest, and the profits to be divided equally, one-half to the New York parties and the other to Kinzie & Pearson, after deducting expenses, and if a loss occurred Kinzie & Pearson were to bear one-half of it.

On the 20th day of April, 1835, Kinzie & Pearson made a declaration of trust, with a schedule of property purchased by them, which was recorded in Cook county on the 11th of May, 1838. Among this property was lot 1, block 79, in the School Section Addition to Chicago. This is the lot in controversy, and was patented to Ebenezer and John Hale, and John conveyed his undivided half to Kinzie & Pearson. The property purchased by them declined greatly in value and they became embarrassed, and one-half of the loss would have been sufficient to ruin them, had they been compelled to bear it. But on the 1st of July, 1841, the contract was rescinded and canceled, and Kinzie & Pearson were released from paying their

share of the loss, and the property remaining unsold was conveyed by them to William Bard, in trust for the parties who had advanced the purchase money.

Ebenezer Hale conveyed his undivided half of the lot to James D. P. Ogden, who had an undivided interest in the other trust property. On the 6th of December, 1842, Bard, as trustee, made a partition with Ogden of the trust property, and Ogden conveyed his half of the lot to Bard, whereby it became a part of the trust property.

On the 23d day of December, 1842, Nicoll, one of the owners, assigned all of his property to Abel T. Anderson, as trustee for the New York Life Insurance and Trust Company, and he, on the 6th of February, 1843, transferred the trust to Bard. In the spring of 1843, this trust property was, by the consent of all parties, divided into ten shares, and one of the shares was allotted to each of the owners of the same; and on the 9th day of August, 1843, Bard conveyed nine of these shares to their respective owners, in partition, the deeds reciting that the conveyance of Kinzie & Pearson to Bard, although absolute on its face, was, in fact, made in trust, for the persons who were the owners. Bard had previously assigned his tenth part to John Bard and conveyed it to him.

On the 26th day of October, 1846, Bard, in execution of the trust in favor of the Insurance and Trust Company, conveyed the tenth, which had previously been held by Nicoll, to Wm. B. Ogden, and in 1849 he conveyed this lot to appellee. Nicoll having died, appellant filed her petition to recover dower in the premises, and on a hearing the court below dismissed her petition, and to reverse that decree she brings the case to this court by appeal.

It is not controverted, that the title to the property in controversy in this case is like that involved in the cases of *Nicoll* v. *Ogden*, 29 Ill. 323, and *Nicoll* v. *Miller*, 37 Ill. 387, and that unless the oral evidence which was introduced in this case explains the title so as to take it out of the rule announced

in those cases, they must govern this. There can be no doubt that the agreement under which this property was purchased rendered it personal in its character. It was purchased on speculation, and for sale, and the capital advanced to be refunded and the profits divided. When it was purchased, and while it was held by Kinzie & Pearson, it was not in the contemplation of the parties that the land should be divided and conveyed to them severally. But the papers show that, instead of the property being sold, it was, on the 26th of July, 1841, transferred to Bard to hold for the benefit of the parties who advanced the money; that they then abandoned the enterprise and released Kinzie & Pearson from their share of the loss.

It is true that the deed to Bard was absolute on its face, but it appears that it was understood that he held for the use of those who advanced the money, and he subsequently recognized their rights by a partition made by all of the parties, and he conveyed to each his several share. He then, at the time he received the deed from Kinzie & Pearson, became invested with a trust estate for the several owners, of whom Nicoll was one. And by that conveyance, what the parties before regarded as, and intended to be, personalty, became realty, and invested with all of its incidents, among which was the inchoate right of dower in the wives of the several beneficiaries, in the trust property. When the partition was made appellant had the right to elect to take dower in the portion assigned to her husband. That then became an inheritable equitable estate, and this court has uniformly held that, under our statute, dower attaches to lands held by the husband by that character of title. He was, then, in a position to force a conveyance in fee, and even when the lands were conveyed to Bard he could have filed a bill and compelled a partition, and thus become invested with the fee, and the right of dower then vested in appellant. But it is claimed that the character of the property, or the purposes for which it was held, was not in

fact changed by that transaction, and that this is proved by the evidence of several witnesses.

As would naturally be expected, after a third of a century from the commencement of the transaction, and a quarter of a century from its close, the witnesses testify in very general terms, giving their opinions and impressions. It would be remarkable indeed if it could be otherwise. Wm. B. Ogden frequently states, in his testimony, that he fails to remember facts, as the transaction had occurred so long since. He supposes that it was not the design of the parties to make a partition at the time the property was conveyed to Bard, and that they intended to transfer to him the right to sell and convey as Kinzie & Pearson had done. But he evidently infers this from the form of the deed and other papers in the case. He does not say that he ever heard this from the parties, or from either of them. He does not pretend to give conversations or agreements between the parties, and his testimony in nowise affects the character of the transaction as disclosed by the deeds and other papers in the case.

It seems that Butler was the attorney of the parties, and held a tenth interest in the property. So far as the arrangement is disclosed by the papers, his evidence is clear as to dates, sums, persons, and terms and conditions of the agreement, but when he speaks of agreements not disclosed by documentary evidence, he seems to testify to inferences and conclusions. He nowhere speaks of any meeting or conference of the parties in reference to the transfer to Bard, or to anything that was said or agreed to by the parties in interest in reference to how Bard should hold the property—whether for sale or partition. And he says he has no recollection that Nicoll ever agreed that Bard should hold it for sale, and not to be divided. While the manner in which these witnesses testified inspires a belief that their evidence is fair and that they are conscientious, we at the same time feel that it is only based on inferences and conclusions drawn to a great extent

from the documentary evidence in the case, and from a general recollection of the transaction. It cannot be expected, after such a lapse of time, that any, even the most tenacious memory could recall the details of a transaction that may have taken several conferences of the parties to agree upon.

When such important powers are conferred, as to give a discretion to sell and convey such large quantities of property, upon an individual by the owners, it would be natural for them to confer and agree upon the person selected, the extent of power he should exercise, and the mode in which it should be performed. Trustees are usually selected on account of their fitness for the place, and in addition to fidelity, judgment, skill, and business qualifications are sought in making a choice; and it is not probable that the trustee would be selected to receive the property from Kinzie & Pearson without the parties agreeing upon the extent of the powers he should exercise. If such an agreement was entered into it is most probable that it was carried out when the division was made. It appears, from the evidence, that this property had fallen greatly in price, and was not salable, and that the original design of the enterprise could not be carried out, as the property could not be sold within the limited period. Nor could Butler, as attorney for the others, unless expressly authorized, transfer the power of sale to Bard that had been conferred upon Kinzie & Pearson. But a careful examination of all the evidence in this record fails to satisfy us that the documentary evidence does not speak the intention of the parties.

The very fact that deeds of conveyance and written instruments are required to evidence the title to lands, admonishes us that a court should at all times require satisfactory evidence of a mistake before a deed will be reformed, or a trust declared different from that deliberately entered into by the parties. When the transaction is remote, and when, from its ancient character, many circumstances attending the transaction

must have faded from the most tenacious memory, the court will require the most satisfactory and convincing proof. In such cases it should be clear, consistent, full, circumstantial and satisfactory. It would be hazardous in the extreme to overturn titles relied upon for a quarter of a century, on vague, loose testimony as to mere inferences. Such a practice would render titles to real estate insecure, and defeat, in a great degree, the object of the statute, which requires titles to real estate to be evidenced by writing. While we will not say that a deed could not be reformed or a trust declared after such a length of time, we will say that it should never be done except upon the most satisfactory and conclusive proof. A careful examination of this record fails to satisfy us that this case differs materially from *Nicoll* v. *Ogden*, and *Nicoll* v. *Miller*, and we must hold that those cases are conclusive of this. It then follows, that the court below erred in dismissing the petition.

The decree of the court below is reversed and the cause remanded.

Decree reversed.

JAMES J. DULL *et al.*

v.

GEORGE R. BRAMHALL.

CONTRACT—*construction thereof.* A contractor who had engaged to construct a piece of work, employed another, at certain stipulated wages, to superintend the construction, having previously requested the latter to make the plans and devise the best means by which certain difficult parts of the work could be accomplished. After his employment, the superintendent, at the request of his employer, applied these plans in the execution of the work, which was successfully done.

Syllabus. Statement of the case.

Held, in an action against the contractor by his employee, to recover for the skill and labor bestowed in the making of those plans, that they were not embraced in the original contract of employment, nor in the duties thereby imposed, and he might recover additional compensation therefor.

APPEAL from the Superior Court of Chicago; the Hon. JOHN A. JAMESON, Judge, presiding.

This was an action of assumpsit, brought in the court below by Bramhall, against Dull & Gowan, to recover for work and labor. It appears that Dull & Gowan having taken the contract to construct the lake tunnel for the city of Chicago, engaged Bramhall, in December, 1863, to come to Chicago to work for them as a carpenter, to superintend the construction of the crib, at such reasonable wages as he should ask. He came in April, 1864, and commenced work at $4 per day. His wages were afterwards raised from time to time, at his suggestion. He continued to work as superintendent of the building of the crib till it was nearly completed, in the fall of 1864, and quit the employment of Dull & Gowan on the 3d of November, of that year, and went back to Pennsylvania. On December 12th, he returned to Chicago, and entered into the service of C. H. McCormick, as general superintendent of his reaper factory. In January following, Mr. Dull expressed a desire that Bramhall should return in the spring, and superintend the completion of the crib, which, on account of his engagement with McCormick, he declined to do, but recommended another man to fill his place. Mr. Dull also desired him to make plans for launching the crib and putting down large iron cylinders at the lake end of the tunnel, and show the new man where he left off in the construction of the crib. The crib had been constructed on the edge of a dock, and required to be launched after its completion, and towed out into the lake, and sunk at the extreme lake end of the tunnel. The cylinder was to be composed of sections of immense weight, which were to be united and sunk

within the hold of the crib, and form the inlet of the water into the tunnel, a new and difficult undertaking, for which the city furnished no plans. During the winter, and while he was still in the service of McCormick, Bramhall employed his evenings in contriving and making the required plans, which were finally adopted by Dull & Gowan, in preference to plans of other persons (also submitted to them and the city's engineer), and used under the superintending direction of Bramhall with perfect success. At the time of their adoption, April 8th, 1865, Bramhall entered in his book of accounts a charge of $500 for each plan.

Yielding to the earnest solicitation of Dull & Gowan, Bramhall went back into their service in the spring of 1865, at $6 per day, and was again placed in charge of the construction of the crib; and, when it was completed, executed the plans for the launching which he had made during the winter previous, and also that for putting down the cylinders. While he was working upon the crib, Dull & Gowan having experimented with machinery, which they had contrived upon various plans furnished them by others, applied to Bramhall for some plan for putting screw anchors, which were to hold the crib in its place while being loaded with stone and sunk in its place in the lake. This he undertook, bestowing his evenings upon it till he produced a plan which was adopted, and which accomplished the purpose; and, on the day the anchors were put down, entered in his book a charge for the making of these plans. When the cylinders were being put down, some time in July, Bramhall told Gowan he had charged for the plans, and Gowan replied that, "when they got the work done they would pay him well for the plans." And again, in 1867, after Dull & Gowan had completed their contract, Dull promised "to pay well for the plans if they got their pay from the city, and would pay something anyway." There was afterwards an attempt to settle the matter

for two hundred dollars, which failed because Mr. Gowan neglected to comply with his promise to pay that amount.

A trial resulted in a verdict for the plaintiff for $650, and judgment was entered accordingly. The defendants thereupon took this appeal, and ask a reversal on the ground that the services sued for were embraced in the duties of the plaintiff, as fixed in the original contract of employment, and they were not, therefore, liable to pay him extra compensation therefor.

Messrs. BATES & TOWSLEE, for the appellants.

Messrs. HURD, BOOTH & KREAMER, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

The testimony in this case strongly preponderates in support of the verdict of the jury.

The important question was, did the plaintiff engage to furnish these ingenious plans for launching and anchoring the crib, when he engaged to take the superintendency of the work as a carpenter?

We think it is clearly shown, that it was no part of his original employment or duty—it was extra work outside of the contract, and the plans were designed when he was not in the employment of the defendants, and for which he entered a charge in his book.

The plans were acknowledged to be very ingenious, and quite successful, giving evidence of such inventive genius as in most countries would have been attended by high honor and great reward.

The record cannot be read without coming to the conclusion that appellee worthily earned the pittance ($625) the jury gave him, and that it was extra work there can be no doubt.

There is no question of law in the case. The qualification claimed by appellants to appellee's third and fourth instructions, fully appear in instructions two and six given for him, and in many of the instructions given for the appellants.

So far as the testimony can be said to be conflicting, the jury have reconciled it as best they could, and there is nothing in the case on which we could take hold, to disturb the verdict. So far as it goes, it does appellee but slight justice.

There being no error in the record, the judgment must be affirmed.

Judgment affirmed.

J. D. DUNNING

v.

C. B. MAUZY.

LANDLORD AND TENANT—*permission to surrender lease—given without consideration—may be revoked before acted upon.* A mere license given by a landlord to his tenant, to surrender the lease, where there is no consideration for such permission, may be revoked by the landlord at any time before it has been acted upon.

APPEAL from the Circuit Court of Kane county; the Hon. ISAAC G. WILSON, Judge, presiding.

The opinion states the case.

Mr. S. A. BROWN, for the appellant.

Messrs. METZNER & ALLEN, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of covenant, brought by Dunning against Mauzy, for the recovery of rent. The parties were both sworn, and the jury found a verdict for the defendant, upon which the court rendered judgment and the plaintiff appealed.

It appears the plaintiff leased the premises to the defendant for two years, and the latter occupied them for about sixteen months, and then left. The plaintiff testifies that he told the defendant, before the expiration of the second year, he might leave at any time, if he could get a good tenant to take his place. The defendant swears that the plaintiff told him he might leave at any time, without this or any other qualification, but admits that before he did leave, the plaintiff revoked this permission. In this state of the evidence, the court gave the jury the following instruction, among others, for the defendant:

"If the jury believe from the evidence, that it was agreed between the plaintiff and the defendant, after the execution of said lease, that the defendant would give up said premises to the plaintiff at any time when said defendant desired, and that in pursuance of said agreement the defendant did give up said premises to the plaintiff, and paid all rents due up to that time, then and in that case the plaintiff is not entitled to recover any rent for said premises after such given up possession."

The jury would undoubtedly understand this instruction as meaning, that if the defendant left the premises after a verbal permission on the part of the plaintiff that he might do so, and had paid the rent due up to the time of leaving, he would not be liable for rent for the residue of the term, without reference to the question whether such permission had been

withdrawn before the defendant acted upon it. Understood in this sense, the instruction would not be the law.

Admitting that the plaintiff had told the defendant he might leave when he pleased, without condition or qualification, it is not pretended there was any consideration for such permission. It was a mere license, without consideration, and the plaintiff had the right to revoke it at any time before the defendant acted upon it. If the defendant had left before it was revoked, or if he had hired other premises, on the faith of such license, a different question would be presented. But nothing of this kind is shown in the evidence, nor is there any such qualification in the instruction.

For the error in this instruction, and because the evidence of the defendant himself shows a mere permission to leave, given without consideration, and revoked before it was acted upon, the judgment must be reversed.

Judgment reversed.

GRANDERSON R. PHARES

v.

NORRIS S BARBOUR.

1. SURETY—*mortgage taken by a creditor from principal debtor as a further security—enures to the benefit of the surety—as well as to the creditor.* The principle is well settled, that where a mortgage is taken by a creditor from the principal debtor, as a further security for his debt, the mortgage so taken must be held in trust, not only for the benefit of such creditor, but for the surety's indemnity.

2. SAME—*creditor becomes a trustee as to the property mortgaged, and must deal with it in good faith.* In such case, the creditor becomes a trustee as to the mortgaged property, and this relation imposes it as an obligation upon him to act in good faith towards his *cestui que trust*, in dealing with the fund, and hold it fairly and impartially, for the benefit of the surety, as well as for himself.

Syllabus. Statement of the case.

3. SAME—*creditor violating his trust—must account for the full value of the property.* And if the creditor parts with the property so mortgaged, without the knowledge, or against the will of the surety, or does any act in violation of the trust, or omits to perform any duty which this relation imposes, whereby the surety is injured, he must be held to account for its full value.

4. TRUSTEE—*cannot become a purchaser at his own sale.* A trustee employed to sell trust property, cannot, either directly or indirectly, become a purchaser at his own sale.

5. SURETY—*extension of time to principal—when surety released.* When the payee of a note, gives time or forbearance to the principal debtor, by a promise binding in law, without the knowledge or consent of the surety, the latter is discharged.

6. EVIDENCE—*in what cases—husband or wife cannot be a witness for or against each other.* In an action against the sureties upon a note, the wife of one of the defendants was offered as a witness to testify to what the plaintiff had told her, at the time when he called for her husband to go and see the principal debtor, and get him to execute a mortgage as a further security for the debt. *Held*, that she was incompetent.

7. SAME—*construction of act of* 1867. Under the act of February 14th, 1867, neither the husband nor wife can be a witness, for or against each other, except in the particular cases specified in the statute.

APPEAL from the Circuit Court of Peoria county; the Hon. SABIN D. PUTERBAUGH, Judge, presiding.

This was an action in assumpsit, brought by the appellee, Norris S. Barbour, in the court below, against the appellant, Granderson R. Phares, and William Croka and Thomas J. Hoffman, upon a note given by them to appellee to secure a debt of Hoffman's. Appellant and Croka signed as sureties, at the request of appellee. The facts in the case are fully stated in the opinion.

Messrs. WEAD & JACK, for the appellant.

Messrs. JOHNSON & HOPKINS, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears, from the record in this case, that on the 30th day of January, 1857, Hoffman, Phares and Croka executed a note to appellee, the first as principal and the other two as sureties, for the sum of three hundred and fourteen dollars, payable on the 1st day of February, 1858. Although the fact that the two latter names to the note are not signed as sureties, still the evidence shows that appellee knew the fact when the note was executed. It also appears that after the note fell due, appellee, by the assistance of the sureties, procured Hoffman to execute a chattel mortgage, which embraced two horses and a two-horse wagon, a set of double harness and a plow, to secure the debt, when the time for its payment was extended until the 1st of January, 1859. Hoffman was to retain possession, by the terms of the mortgage, until that time, unless the property was levied upon, removed, or attempts were made for its sale by Hoffman. On a breach of the conditions of the mortgage, by failing to pay the debt at its maturity or otherwise, appellee was authorized to take the property into possession, and after giving six days' written or printed notice, to sell the same and apply the proceeds to the payment of the note.

There seems to be little if any doubt, from the evidence, that the sureties as well as appellee, understood at the time, that the execution of the mortgage was to release them from their liability as sureties on the note. It seems that when the mortgage was executed, Phares insisted that his name should be taken off the note, but appellee replied that he would never call upon him for payment, and did not hold him for it any longer. There seems to be no dispute that the property was worth as much as four hundred dollars, at the very least, when the mortgage matured. About the time the money became due under the terms of the mortgage, appellee took the property into possession, gave a notice, as he swears, sold it at auction, and it was struck off to one Hutchinson for the sum of thirty-one dollars, which was credited upon the note.

Appellee swears that he did not bid off the property, but he requested Hutchinson to do so, which he did and afterwards turned it over to appellee. The evidence further shows that he turned over one of the horses to Hoffman upon his paying appellee seventy-five dollars. But we are unable to discover, from the evidence, what became of the remainder of the property. Nor does it appear that he gave the sureties any notice of the sale of the mortgaged property.

It also appears that after about eight years had elapsed, and Hoffman had removed to Ohio, appellee brought this suit upon the note, and obtained service upon the sureties alone, Hoffman not being found. They appeared and filed several pleas, among which, one of release and extension of time of payment of the note, without the consent of the sureties. Issues were formed, and a trial was had by the court and a jury, resulting in a verdict in favor of appellee for the amount of the note and interest, after deducting the thirty dollars credited for the sale of the property under the mortgage. A motion for a new trial was entered, but it was overruled by the court and judgment rendered on the verdict; to reverse which Phares prosecutes this appeal, and insists that the verdict is against the evidence, and that the court gave improper instructions for appellee and refused proper ones asked for appellant.

It is a rule of law, firmly established and fully recognized, that a trustee must act in good faith towards the *cestui que trust*, with reference to the trust fund; and if he fails in the discharge of the duty that relation imposes, he will be chargeable with loss or injury sustained by the beneficiary, growing out of his want of reasonable care, or from acts of bad faith. When appellee took possession of the property under the mortgage, he thereby became a trustee, not only for Hoffman but also for the sureties on the note. And occupying that relation, he was bound to use all reasonable efforts for its preservation, and under the provisions of the mortgage, to sell it for the best price that could be obtained. A person thus situated,

who appropriates the trust property contrary to the terms of the mortgage, must be held to account for its full value. He has no right to appropriate it contrary to the terms of the mortgage to his own use, and escape the effect of his violation of his trust by accounting for merely a nominal sum.

It is equally true that a trustee empowered to sell trust property, cannot, either directly or indirectly, become a purchaser at his own sale. The law will not permit men to be thus tempted to act in bad faith, and to commit a fraud upon the *cestui que trust*. And all men seem to know that this cannot be done directly; they seem intuitively to know that it is wrong, and that the law does not sanction such a purpose, and hence, where such an advantage is sought, the trustee almost invariably employs a third person to become the bidder and ostensible purchaser, hoping by that means to conceal the fraud, and thus to reap its fruits. In this case, appellee employed Hutchinson to become the bidder, and the great sacrifice at which this property was sold clearly manifests the wisdom of the rule. Property conceded to be worth fully four hundred dollars was struck off by appellee, to a person bidding for him and from whom he afterwards received it without other cost, at the small sum of thirty-one dollars. Although the evidence does not show all the means that were resorted to for the purpose of producing such a result, we feel justified in the conclusion that it could not have been fair and right.

Having, then, attempted to become the purchaser at his own sale, where he could, and no doubt did, strike off the property at the lowest price he could, with any show of fairness, it would be inequitable, unjust and illegal to permit him, after having obtained the property in that manner, to escape liability to account for no more than the nominal sum at which it was struck off to his own bidder. Having violated the trust reposed in him and appropriated the property to his own use, he should, by every principle of reason

and justice, be required to account for its full value. Nor would the fact that he may have wasted or destroyed the property relieve him from such a liability.

It is a well established rule in equity jurisprudence, that where a creditor procures further security by the pledge of property, he thereby becomes a trustee as to that property, for the sureties for the payment of the debt. By his taking a mortgage or other pledge it enures to the benefit of the sureties as well as to the creditor. In such a case they have the right to discharge the debt and compel the creditor to transfer the mortgage or pledge to them for their indemnity. Where additional security is taken, it is regarded as an indemnity to both creditor and the sureties; and any waste or misapplication of the pledge operates as a release to the sureties to the extent of the waste or misapplication. Where the creditor receives such a pledge he becomes a trustee for the sureties, and is bound to observe the duties that relation imposes as to the trust property. These equitable and just rules, anciently applicable only to a court of equity, have long been fully recognized and enforced in courts of law. The rule was recognized and applied in the case of *Rogers* v. *Trustees of Schools*, 46 Ill. 428. It then follows, that the sureties in this case became interested in the proper management and application of the mortgaged property to the payment of this note; and when appellee appropriated this property he released the sureties to the extent of the value thus appropriated. Or if he restored it to Hoffman the result would be the same as to them whether he would be left liable for the note or not, as that would depend on other principles. In this view of the case, the fourth and fifth of appellant's instructions should have been given, and the court erred in their refusal.

If a creditor gives time, by a valid and binding agreement capable of being enforced, to the principal debtor, without consent of the sureties, he thereby releases the latter from their obligation to pay the debt. And if such was the fact in

this case appellant would be released; but that is a question which will be passed upon by another jury on the evidence which will then be before them, and hence it is unimportant to discuss the question whether the evidence in this record proves such a discharge of appellant.

It is urged that plaintiff's third instruction was wrong, and should not have been given. That instruction is:

"The court instructs the jury that the mere extending the time for the payment of said note, and the taking of a mortgage upon the goods and chattels of the said Thomas J. Hoffman would not release the securities on said note, unless the same was done without or against the knowledge or consent of said securities, or upon a contract or agreement to release them."

We are unable to perceive any objection to this instruction, as it, we think, conforms to the law. It expressly states that an extension of time to the principal for payment, unless without or against the knowledge or consent of the sureties, would not release them. If they consented to the extension of time for payment they would not be released, but if time was given without or against their consent, then, as we have seen, they would be released, and this instruction fairly presents that question to the jury, and the court did not err in giving it.

It is lastly urged that the court below erred in not permitting the wife of appellant to testify as a witness. At the common law all know she was incompetent to give evidence either for or against her husband. It is, however, urged that the act of 1867, (Gross' Comp. p. 286,) has, in this respect, changed the common law rule. The 1st section of the act declares who may be witnesses, and fixes the limitations under which certain persons may testify. But the 5th section declares that no husband or wife shall, by virtue of that act, be rendered competent to testify for or against each other as

to any past transaction or conversation occurring during marriage or after its dissolution, except in cases where the wife would, if unmarried, be plaintiff or defendant, or the action grows out of a personal wrong to the wife, or the neglect of the husband to furnish the wife with suitable support, and except in cases concerning the wife's separate property. It will be seen from these provisions that the wife is not a witness for or against the husband except in certain specified cases, and it is apparent this is not one of the cases enumerated in the law. Not having been provided for by the statute, she was not competent in this case, and the court did right in refusing to permit her to testify.

But for the errors indicated, the judgment of the court below must be reversed and the cause remanded for further proceeding not inconsistent with this opinion.

Judgment reversed.

JOSEPH W. RUCKER

v.

SARAH DOOLEY *et al.*

1. SHERIFF'S DEED—*within what time it must be executed.* Although the statute requires a sheriff, on presentation of the certificate of purchase of land sold under execution, to make a deed to the holder thereof, if the land be not redeemed, yet such presentation must be made within a reasonable time, and that reasonable time must be considered, as the time in which the judgment is a lien, adding thereto the fifteen months allowed for redemption.

2. If the application for a deed be made after the eight years and three months have elapsed, and within twenty years, the same must be made through the court from which the execution issued, by a rule upon the sheriff to show cause, and on notice to parties interested, as intermediate purchasers from the judgment debtor or otherwise.

3. But the court would be inclined to hold, in analogy to the statute of limitations, and for the protection of purchasers for a valuable consideration, without notice of any lien, from the judgment debtor or those claiming under him, that after the lapse of twenty years a sheriff's deed should not be executed to the holder of a certificate of purchase not under legal disabilities, on the application of the holder to the sheriff, or by any rule or order of court upon him for such purpose; that such lapse of time should be considered an insuperable bar to its execution.

4. In this case a sheriff's deed was executed on the application to the sheriff by the holder of the certificate, twenty-nine years after the sale on execution. In the intervening time the judgment debtor sold and conveyed the land, the title passing by several subsequent conveyances to a remote purchaser, for a valuable consideration, and without notice of any lien, and who entered into possession before the sheriff's deed was made. It was *held*, the sheriff was not warranted in making the deed, after such a lapse of time, and it was set aside as a cloud upon the title of the party in possession.

5. BILL TO QUIET TITLE—*character of title required.* A complainant in a suit to quiet title is not bound to show a perfect title as against all the world, as in the case of a party seeking to recover possession.

6. SAME—*what character of relief is proper.* On a bill to quiet the title of the complainant, where it is alleged that a sheriff's deed executed to the defendant is a cloud upon such title, it will be proper, the facts warranting it, to quiet the title of the complainant by setting aside the sheriff's deed, but the court should not decree a conveyance by the holder of such deed to the complainant.

APPEAL from the Superior Court of Chicago; the Hon. JOHN A. JAMESON, Judge, presiding.

The opinion states the case.

Mr. JOHN G. ROGERS and Mr. E. A. RUCKER, for the appellant.

Messrs. WILSON & MARTIN, for the appellees.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

The object of the bill in this case was to quiet the title to a certain tract of land in Cook county, both parties claiming

through the same source. The defendants, Weston, Davis and Hambleton, had enclosed the land, under their chain of title, in 1867, before the bill was filed and before the defendant Rucker had received the sheriff's deed, on which his claim was based, that deed bearing date January 6th, 1868.

It appears the land was sold by the sheriff of Cook county, on a judgment rendered in the Municipal Court of Chicago, in favor of one Murphy against John K. Boyer and Peter Pruyne, at the November term, 1837. The execution was dated March 22, 1838, and a levy and sale thereon to Henry L. Rucker, the certificate of which bears date July 25, 1838, the sum bid being fifty dollars, and the land being forty acres in section 20 in township 40 north, range 14 east.

H. L. Rucker assigned this certificate, it is alleged, to Joseph W. Rucker, the appellant, some seventeen years after its date, to wit: on the 5th of March, 1855. Appellant took no steps to procure a deed until the 6th of January, 1868, on which day the sheriff of Cook county executed to him a deed for the premises. During all this time, from July, 1838, to January, 1868, the land had passed through several purchasers claiming under Boyer by a regular chain of conveyances, duly recorded, up to John Dooley, the husband and devisor of the appellee, Sarah, when, in 1859, he claimed to be the legal owner. On the 21st November, 1867, John Dooley sold and agreed to convey the south-half of the premises to Weston, Davis and Hambleton at a stipulated price, one-half of which they had paid. They immediately entered into the possession of the premises and enclosed them by a fence, with the consent of Dooley.

In the beginning of January, 1868, it appears that one George B. Davis had agreed with Weston, Davis and Hambleton to purchase three acres of this land, and they furnished him with an abstract of title. On the 4th day of January, Davis laid this abstract before his attorney, Edward A. Rucker, Esq., for examination. On the 6th of January, it is alleged,

Mr. Rucker procured, in the name of his brother, Joseph W., the appellant, a sheriff's deed of the premises, and on the next day caused the deed to be recorded, and soon afterwards informed George B. Davis that on examination of the abstract he found he himself was the owner of the premises, and proposed to sell them to Davis. Upon this, the purchasers from Dooley declined to make any further payments, and this bill was filed to remove the cloud thus created by the sheriff's deed. The Superior Court of Chicago, in which this bill was filed, decreed, substantially, that this deed was a cloud upon the complainant's title, and set it aside and ordered a re-conveyance from Rucker to Dooley, decreeing that the sheriff had no lawful power or authority to execute such deed, and that the same was fraudulent and void in law.

To reverse this decision the record is brought here by appeal, and several points are made which are disposed of by considering this question: Was the sheriff warranted, after the lapse of twenty-nine years, in making the deed to appellant?

The appellant insists, that there was no time limited within which the holder of a certificate of purchase was required to take out a deed after he became entitled to it.

There is, it is admitted, no express legislation on this subject, but there are well established principles of law, quite as potential as positive legislation, in the absence of legislation upon the subject.

Secret liens, such as the certificate of purchase may justly be considered, no publicity being given to them by recording them, are not favored in law, and are not usually enforced to the overthrow of rights honestly acquired without any notice of such liens.

The analogies of the law must be considered with reference to appellant's proposition. By statute, a judgment is a lien upon land for seven years, and then only when an execution has been taken out within a year. A writ of entry is barred after the lapse of twenty years. In *McCoy* v. *Morrow*, 18 Ill.

518, this court said, that creditors have a lien in this State against the estate of their deceased debtors for the satisfaction of their debts, which they may enforce through administration even against purchasers from heirs or devisees, and there is no statute interposing any limitation of time within which the lien must be enforced. The notion that this lien is perpetual, and may be enforced at any time against the land, after alienation by the heir, is wholly inadmissible.

The policy of our law is, to afford notice through public offices and records, of liens against lands, and the law will not favor liens of which it has provided no public notice. Nor does the law favor stale demands and rights slept on, until other rights and interests have arisen and become involved, which, from lapse of time, and consequent difficulty of proof, may be jeoparded by the setting up and sustaining the former; and in support of rights and possessions long claimed and enjoyed without interruption, the law will presume grants or satisfaction of demands. After the lapse of twenty years, debts of whatever degree, are presumed to have been satisfied, and this principle will defeat a recovery on them, unless rebutted by proof. By our statute of limitations, actions for debts are barred in sixteen years, and entry upon and action for the recovery of land held adversely, under claim of right for twenty years, are barred by our law—seven years also bars entry and action when land is adversely possessed during that time, under certain circumstances. This court has held, in analogy to the law requiring an infant whose land has been sold for taxes to redeem the same within three years after becoming of age, that the infant must repudiate his deed within the same period. *Cole* v. *Pennoyer*, 14 Ill. 159, and *Blankenship* v. *Stout*, 25 ib. 132. The court concludes by saying, "In short, the policy of our law is repose and security of titles and estates against dormant claims."

This was a case where the creditors of an intestate debtor sought to subject his lands to the payment of their debts,

twenty-five years having elapsed before they filed their claims for allowance, and eighteen years after final settlement of administration. In the meantime, and nineteen years after the death of the debtor, the heir conveyed the land, by deed duly recorded, before any step had been taken by the creditors to enforce their claims.

The court found against the creditors, and established the title in the vendee of the heir. Without laying down any definite rule as to what should be a reasonable time within which such creditors should proceed to enforce their lien, the organ of the court, on that occasion, said, that, "certainty in the law so necessary to enable the citizen to know his rights of property—by analogy to the lien of judgments and the limitations of entry upon and action for the recovery of lands, requires the application to this case of the fixed period of seven years from the death of the ancestor."

Here, the vendee of the heir-at-law was protected against a secret lien of creditors, they having suffered it to become dormant by the lapse of eighteen years after final settlement of the estate by the administrator. Pursuing, in some degree, this same analogy, and for the protection of purchasers for a valuable consideration, without notice of any lien, from the judgment debtor and those claiming under him, we should be inclined to hold, after the lapse of twenty years, being the longest time of limitation known to our laws, a sheriff's deed should not be executed to the holder of a certificate of purchase, not under legal disabilities, on the application of the holder to the sheriff, nor by any rule or order of court upon him for such purpose; that such lapse of time shall be considered an insuperable bar to its execution. If the application for a deed be made after the eight years and three months have elapsed, and within twenty years, the same must be made through the proper court, by a rule upon the sheriff to show cause, and on notice to parties interested, when the record should show the existence of intermediate purchasers from the

judgment debtor, or shall otherwise appear, of the particular lot or tract of land described in the certificate.

Although the statute requires the sheriff, on presentation of the certificate of purchase by the holder thereof, to make a deed to such holder, if the land be not redeemed, it is in the spirit of this enactment that such presentation and demand for a deed shall be made within a reasonable time, and that reasonable time ought to be, and must be, considered, as the time in which the judgment is a lien, *plus* the fifteen months allowed for redemption. After that time, the deed must be sought through the court where the judgment rests and from which the execution issued, and the action of the court, on the application, must depend on the circumstances of each case.

It is not just that a purchaser from a judgment debtor of the land sold under an execution against him, who has bought in good faith, paid a valuable consideration, and having no notice, actual or constructive, of any lien, and who is in possession, should, after the lapse of years, be disturbed in his possession by setting up a lien, which the holder failed to assert in a reasonable time. After the lapse of twenty-nine years, no suggestion can prevail in favor of the execution of such deed, to the detriment of intermediate purchasers for a valuable consideration, and without notice.

As this court said in *McCoy* v. *Morrow*, *supra*, "There are few greater public misfortunes than insecurity of titles to real property. It paralyzes industry, and destroys that incentive to labor and enterprise which a reasonable certainty of just reward alone will create, and upon which depends the public and private prosperity."

After such a lapse of time, what is the reasonable presumption? During the whole of which, near thirty years, neither appellant, the judgment debtor, nor any other person, save the complainant in the bill and those under whom he claimed, set up any title whatever to the premises. Is it not a fair and reasonable presumption that the judgment debtor had

adjusted this purchase with Rucker, the purchaser, and neglected to take up the certificate? The sum of money to be paid was trifling, compared to the value of the property sold, and when the conduct of men of ordinary prudence and sagacity is considered, the presumption is very strong that the entire matter was adjusted with the purchaser satisfactorily to him, years before the execution of this deed. We hear nothing of this claim—it sleeps the sleep of near the third of a century, and is only asserted when *bona fide* purchasers, without notice, had taken actual possession, by making the most visible marks of ownership, entering under deeds and contracts, which, to that day, had remained unchallenged.

It is objected by appellant, that some of the deeds by which appellees connected themselves with Boyer, the common source of title, are obnoxious to objections, and cannot be used in evidence. However that may be, this much is proved and is certain, that Dooley's family were in the actual possession of the premises when appellant took out his sheriff's deed; that Dooley bought, in 1859, under a chain of recorded conveyances running directly back to Boyer, and since that time has claimed the ownership under such chain, and his actual possession under such a chain, entitles him to protection against disturbance by such a groundless title as that of the defendant. We do not understand that a plaintiff in a suit to quiet title is bound to show a perfect title as against all the world, as in the case of a party seeking to recover possession. It is immaterial to defendants who show themselves in no way connected with the property. *Craft* v. *Merrill et al.*, 14 N. Y. 456.

The court below decided correctly in quieting the title of complainant as against the sheriff's deed to appellant, but we are of opinion it should have stopped there without decreeing a re-conveyance to the complainant, and the decree will stand modified to that extent, and in other respects will be affirmed.

The costs of this court will be equally divided between the parties.

Decree affirmed.

THE TOLEDO, PEORIA AND WARSAW RAILWAY COMPANY

v.

DANIEL PARKER *et al.*

1. NEGLIGENCE—*liability of a railroad company for killing stock.* In an action against a railroad company for killing stock, an instruction is not objectionable which fails to exclude *all* of the places excepted by the statute from being fenced, where it is apparent from the testimony that the injury did not occur in one of the excepted places, witnesses having been permitted to testify *without objection* that the injury happened at a place where the defendant was bound to fence its road.

2. SAME—*stock injured—duty of owners as to its disposal.* And in such case, where the stock at the time the injury occurred, was in good condition, it is the duty of the owner to dispose of it to the best advantage possible, by converting it into beef, or otherwise, and he is entitled to a reasonable time thereafter within which to do so.

3. SAME—*when owner discharged from the performance of such service.* And it cannot be objected in such case, that the owner failed to perform his duty in the premises, in not disposing of the stock to some profit, where the evidence shows that on the evening of the day when the injury occurred, the stock was taken possession of and buried by the employees of the defendant.

4. SAME—*the question—what is a reasonable time—for the jury to determine.* In such case, an instruction which assumes to inform the jury what was a reasonable time within which the owner should have taken possession of the injured stock, is erroneous; that question is for the jury to determine, from all of the circumstances.

5. EVIDENCE—*objection to admissibility of—cannot be made in the appellate court for the first time.* An objection to the admissibility of evidence cannot be made for the first time in this court.

Appeal from the Circuit Court of Iroquois county; the Hon. Charles H. Wood, Judge, presiding.

The opinion states the case sufficiently.

Messrs. Bryan & Cochran, for the appellants.

Messrs. Blades & Kay, for the appellees.

Mr. Justice Walker delivered the opinion of the Court:

It appears from the record in this case, that appellees brought suit against appellants, before a justice of the peace, to recover for killing a steer on their road with an engine and cars. A trial was had, resulting in a judgment against the company, from which an appeal was prosecuted by them to the circuit court of Iroquois county. A trial was subsequently had in that court with a like result as that before the justice of the peace, from which an appeal is prosecuted to this court.

It is first urged by appellants' argument that the court below erred in giving appellees' instruction; that the instruction excludes road-crossings, places five miles from a settlement, but fails to exclude cities, towns or villages; that the injury may, for aught that appears from the evidence, have occurred in a town or village, and hence the instruction was wrong. A careful examination of the evidence, we think, excludes any inference that it could have occurred in one of those places. Witnesses testified, without objection, that the animal was killed at a place where the company were required to fence their road. It may be that this evidence was not strictly proper, but appellants interposed no objection to its admission. Had the animal been killed in one of the excepted places, then it could not be said to have occurred at a place required to be fenced. From this evidence the jury were fully warranted in finding that the place was not one of those

excepted by the statute from being fenced. Nor do we see that the instruction could have misled them in finding their verdict. There is nothing in the evidence from which it could be inferred that the injury occurred in a village, but on the contrary it tended to prove that it was not in a village, and it was expressly proved that it was not in a town or city.

It is urged, as the animal was in good condition and would have made good beef, that appellees should have converted it into beef and disposed of it for what it would have brought. But it appears that the employees of the road buried it on the evening after the accident occurred. Appellees undoubtedly should have had a reasonable time after the injury occurred to take charge of the animal and to convert him, in his crippled condition, into as much as could be realized from his sale as beef or otherwise; and it was a question for the determination of the jury whether the employees of the road afforded such an opportunity to appellees. One of them testifies that he went the next day to get the animal, but the evidence shows that it had been buried on the previous evening. If the employees of the road took possession of the animal, and disposed of it before appellees had a reasonable time to take it and convert it to some useful purpose, appellants have no right to complain that it was not done. If their agents prevented appellees from doing so, it was the fault of the company and not of appellees; and the jury have found that it was the fault of the company, and we think the evidence warrants the finding.

It is, however, insisted, that the declarations of Roach, the "section boss," were not admissible to prove that the animal was buried on the evening it was injured. It is only necessary to say that no objections were made to the admission of the evidence of Roach's declarations, as a party can never raise an objection to the admissibility of evidence for the first time in this court.

It is urged that the court below erred in refusing to give appellants' second instruction. This instruction is erroneous, and was properly refused, as it assumed to inform the jury what was a reasonable time within which appellees should have taken possession of the animal. That was a question for the jury to determine from all the circumstances. Appellees were not required to instantly abandon their business and take charge of the animal. If engaged in planting corn or harvesting grain, or engaged in other pressing farm occupations, it would not be reasonable to require them to stop and abandon their business, which was pressing, to take charge of the animal. The requirement must be reasonable and just to charge appellees with such loss. Had it been convenient, then appellees should have taken possession of the animal. Had this instruction been given these questions would have been improperly taken from the consideration of the jury.

A careful examination of the entire record fails to show any error for which the judgment of the court below should be reversed, and it is therefore affirmed.

Judgment affirmed.

Isaac McManus

v.

Robert Keith *et al.*

1. Sales—*in judicial—rule of caveat emptor applies.* M filed a bill in chancery against the heirs of K, to enjoin the collection of certain notes which he had given upon the purchase of real estate, sold by a commissioner under a proceeding in partition, until the determination in his favor of an action of ejectment for the premises, which he had brought against A, the bill alleging that K, in his

life-time, fraudulently obtained the property from A, who was then, and at the time of the sale, in the possession of the same, claiming it as his own, but contained no allegation charging upon the defendants any knowledge of the alleged fraud, or improper conduct. *Held*, that the action of the circuit court, in dismissing the bill was proper, there having been neither fraud nor warranty in the sale.

2. In such cases, the rule of *caveat emptor* applies, and the purchaser acts at his peril. *Owings* v. *Thompson*, 3 Scam. 502.

3. The possession of the premises by A, at the time of the sale, operated as notice of whatever equities he had, as well to M as to the heirs of K, and the latter having had no actual notice of an outstanding equity in A, they and M stand upon common ground.

Appeal from the Circuit Court of Mercer county; the Hon. Arthur A. Smith, Judge, presiding.

The facts are fully stated in the opinion of the court.

Mr. B. C. Taliaferro, for the appellant.

Messrs. Goudy & Chandler, for the appellees.

Mr. Justice Lawrence delivered the opinion of the Court:

This was a bill in chancery, brought by McManus against Keith and others, to enjoin the collection of certain promissory notes given by McManus, upon the purchase of real estate sold by a commissioner under a proceeding in partition. After answers filed, a motion to dissolve the injunction was sustained, and the bill dismissed.

It appears upon the face of the bill, that Robert Keith, one of the defendants, as heir of Robert Keith, deceased, filed a bill for partition of the real estate, making his co-heirs defendants, and the property not being susceptible of partition, a decree of sale was made and executed. The bill alleges that the petition for partition represented said Robert Keith,

deceased, as having had a title in fee simple to the premises of which partition was sought, and avers that the court so found, but that in fact said Robert Keith, although he had an apparent title, had obtained it fraudulently from one Daniel Keith, and that said Daniel Keith was in possession, claiming the property as his own. The bill further alleges that the complainant, as purchaser at the commissioner's sale, had commenced an action of ejectment against said Daniel, which was still pending, and claims that it would be inequitable to permit the notes given by him to the commissioner to be collected or negotiated until the determination of this suit in complainant's favor.

It is apparent, that the case made by this bill does not demand the interference of this court. The maxim, *caveat emptor*, is one of almost universal application to judicial sales, and there is nothing in this case to make it an exception to the rule. It is urged by counsel that the representations contained in the bill for partition, to the effect that the complainant and his co-heirs were the owners of the property, were fraudulent. But this view is erroneous. Fraud consists in the willful allegation of a falsehood, for the purpose of deception, but the appellant does not claim in his bill, or in his argument, that the Robert Keith who filed the bill for partition, or his co-heirs, had any knowledge of the fraud alleged to have been practiced by their ancestor upon Daniel Keith. The defendants in that proceeding could, in no event, be held responsible for the allegations contained in the complainant's bill, but there is nothing disclosed in this record to subject even him to the charge of fraud. He found himself and his co-heirs, by the death of his father, clothed with the legal title to the premises, and he had a right to come into court and ask that they be partitioned among the several heirs, or be sold, if incapable of partition. There was no fraud in this. The possession of Daniel Keith, it is true, was notice of whatever equities he had, but it was precisely the same notice to the purchaser at the commissioner's sale, as to the heirs. As we have already

remarked, there is no pretense that they had actual notice of an outstanding equity, and it follows that they and the purchaser stood upon common ground. If their apparent legal title was really defective, they had no more knowledge of that fact than himself. In the sale of these premises there has been neither fraud nor warranty, and the bill was properly dismissed. *Owings* v. *Thompson*, 3 Scam. 502.

Decree affirmed.

JOHN BUCK

v.

JOHN CONLOGUE.

1. HOMESTEAD EXEMPTION—*abandonment.* B and wife executed to C a conveyance of their homestead, but the deed did not operate to release the homestead right. B continued in the occupancy of the premises after the execution of the deed, under a lease from C, and paid rent therefor. Subsequently B died, leaving a wife and one child, who remained in possession for a time, when the widow intermarried with one M and removed to another town, taking the child with her, and leased the premises to A, appropriating the rents to the education of the child. *Held*, in an action of ejectment brought by C against A, that the homestead right was lost by act of B's widow in abandoning the possession, and that C was entitled to a recovery.

2. SAME—*exemption is not lost—by the act of the grantor in taking a lease from his grantee.* By the mere act of B in taking a lease of the premises from C after the conveyance, and paying rent therefor, no forfeiture was incurred of the right to assert the homestead exemption, either on the part of B in his lifetime, or his widow and child after his death, while they continued to occupy the homestead.

3. SAME—*abandonment.* But B's widow, by her intermarriage with M, and removal with her child to a different town and taking up her residence upon premises owned by her husband, acquired a new home, and by its acquisition lost the right of homestead in the premises.

4. SAME—*intention of returning must be clear.* In such cases, the proof of an intention on the part of the claimant to return and occupy the homestead, must be clear and satisfactory, in order to preserve the right.

5. FORMER DECISIONS. The cases of *Booker* v. *Anderson*, 35 Ill. 67; *Moore* v. *Dunning*, 29 ib. 130; *White* v. *Clark*, 36 ib. 285; *Moore* v. *Titman*, 43 ib. 169, and *Cubeen* v. *Mulligan*, 37 ib. 230, cited and considered, the last two cases being held to fully govern the present one.

6. SAME—*abandonment by the widow—deprive the children of the right.* After the death of B his widow became the head of the family, and by her marriage, and abandonment of the homestead, the child also lost the right to claim the statutory privilege as completely as if the abandonment had occurred during the life of B and by his act.

APPEAL from the Circuit Court of La Salle county; the Hon. MADISON E. HOLLISTER, Judge, presiding.

The opinion states the case.

Messrs. BULL & FOLLETT, for the appellant.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of ejectment, instituted in the La Salle Circuit Court, by appellee, to the June term, 1866, against appellant, for the recovery of lots 9 and 10, in block 94, in the city of La Salle. The plea of the general issue was filed, and a trial had at a subsequent term of the court, without a jury, by consent of the parties, which resulted in a judgment in favor of plaintiff, and to reverse which defendant brings the case to this court by appeal.

On the trial in the court below appellee read in evidence a deed for the property in controversy from George H. Buck and wife to appellee, which bears date on the 26th day of January, 1858. It appears to have been duly acknowledged, and the wife released her dower in the premises, but there was no release of the homestead right by the grantors. It

further appears that George H. Buck was in the actual possession of the premises at the time the conveyance was made; that Buck and family resided upon and occupied the premises before and at the time of the conveyance, as a homestead, and that he rented of appellee and paid him rent on several occasions for the use of the property; that he so continued to occupy the property until his death, and his widow and minor child continued to occupy it as a home after his death until she intermarried with one Morse, when she removed to Sterling, taking her infant child with her; that she rented the property to a tenant, and has applied the rent to the education of the child, who is a daughter, and was twelve or thirteen years old at the trial in the court below.

It further appears from the testimony of appellant, that it has been the intention of Mrs. Morse to return to reside upon the premises. It also appears that her husband owns a house in Sterling and that they reside in the same.

It is urged in favor of a reversal, that Mrs. Morse and her daughter are entitled to hold the premises as a homestead, and that appellant, being her tenant, may show and rely upon that fact as a bar to a recovery. That George H. Buck in his lifetime and until the sale of the premises, had a right to insist upon the homestead, there seems to be no doubt. But whether he still retained it after the sale and receiving a lease and paying rent for the premises presents a different question. In the case of *Booker* v. *Anderson*, 35 Ill. 67, where a debtor had executed a deed of trust with a power of sale, but neither he nor his wife had relinquished the homestead, and after the maturity of the debt the premises were sold under the power contained in the deed of trust and the creditor became the purchaser, and the debtor leased the premises constituting the homestead for a year from the purchaser, and the latter having brought forcible detainer to recover possession, on a bill filed to enjoin that suit, it was held that inasmuch as there had been no release of the homestead so as to bar its assertion, it might

be claimed and enforced notwithstanding the lease and payment of rent. So, in this case, the wife did no act that then barred her from asserting her right of homestead after her husband's death, and she continued to hold the right from that time until her subsequent marriage and removal to reside with her husband at Sterling. The execution of the deed by the husband and wife without releasing the homestead right, or the lease and payment of rent by the husband, did not prevent them in his lifetime, or his wife and child after his death, from claiming the statutory privilege.

Although the right of homestead was retained by Mrs. Morse after the death of her former husband, she undoubtedly, by her subsequent marriage, removal to, and residence with her husband in Sterling, abandoned it. The length of time that had elapsed after her removal to Sterling does not appear, but the evidence shows that her husband owns property there and resides upon it with his wife and family. And there is no evidence in the record from which it can be inferred that she and her husband, at the time of her removal to Sterling, had any intention of returning to La Salle to reside, or that they, at any time prior to the trial below, had any such fixed and settled purpose. It is true the witness says she had such a design, but when it was to be executed and carried into effect does not appear. Such loose, indefinite purposes are not sufficient to preserve the right where the claimant is residing at a different place and on other premises. *Moore* v. *Titman*, 43 Ill. 169. In *Moore* v. *Dunning*, 29 Ill. 130, it was held that the abandonment by the husband of his home and wife and family did not prejudice their right to claim the benefits of the act if they still continued to occupy the homestead; and to the same effect is *White* v. *Clark*, 36 Ill. 285. On the contrary, it has been uniformly held, that where the husband removes from the homestead with his family and acquires another home, the right is lost. *Moore* v. *Titman*, *supra*, and *Cabeen* v. *Mulligan*, 37 Ill. 230. These last two cases fully

govern this, as the evidence of the abandonment by the widow is as clear and satisfactory as it was in those. From the evidence in the case we are satisfied that there was such an abandonment by the widow as precludes her from asserting the right. Her husband's home is her home, and she cannot insist that she has not acquired a new one; and by its acquisition she lost the right of homestead.

But the question still remains to be determined whether the daughter, by the mother's marriage and abandonment of the homestead, lost the right to insist upon the benefit of the statute. In the case of *Wright* v. *Dunning*, 46 Ill. 271, it was said, after the death of the husband, the widow, being under no disability, may abandon the homestead precisely as could the husband. Whenever it appears that it has ceased to be her home and she has acquired another place of permanent abode, she thereby loses all right to claim the statutory privilege; or even if she abandons it with the intention of not returning to it again as her home, the right would be lost. But if, from sickness or other necessary cause, she were to leave temporarily, with the intention of again returning, it would be otherwise.

We have seen that the mother in this case had acquired a new home, and abandoned the property in controversy as a residence, and had thereby lost the right to insist upon the statute. And as the father, as the head of the family, may abandon the homestead so as to deprive his wife and children of the right, for the same reason, where the mother becomes the head of the family, she, by abandoning the homestead, would in the same manner deprive the children of the benefit of the law. After the death of the father the mother becomes the protector of the children, and where she permanently removes from the homestead, or acquires a new residence, it must produce the same effect upon the rights of the children, under the act, as if the abandonment had occurred while under the protection of the father. The mother having acquired a

new home and abandoned the old one, it follows that appellant has no right to invoke the statute as a defense.

The judgment of the court below must be affirmed.

Judgment affirmed.

GUSTAVUS A. MARSH *et al.*

v.

MICHAEL SMITH.

1. TRESPASS AGAINST AN OFFICER—*whether the legality of his appointment can be inquired into.* In an action for trespass assault and battery, and false imprisonment, the defendant justified the arrest out of which the alleged cause of action arose, which arrest was without warrant, upon the ground that he was an officer and found the plaintiff intoxicated and in a suspicious condition in respect to a larceny: *Held*, that the question whether the defendant was an officer legally appointed, could not be tried in this action.

2. SAME—*of arrest upon suspicion.* It is the duty of a police officer, if he knows a felony has been committed in his jurisdiction, and there is good reason to suspect a particular person as being the guilty party, to arrest him and take him before a magistrate for examination.

3. But there must be a strong conviction, from the circumstances, that the party arrested was the felon, for if it should appear there were no such circumstances, a jury can exercise a wide and liberal discretion as to the damages they will give the injured party.

4. INSTRUCTIONS—*questions for the court and jury.* In an action for trespass, based upon an alleged illegal arrest of the plaintiff, where the defendant justified as a policeman of a city, the court, in leaving the question to the jury as to whether the defendant was a duly and legally appointed policeman, should explain to them what constitutes such appointment.

APPEAL from the Circuit Court of Knox county; the Hon. ARTHUR A. SMITH, Judge, presiding.

This was an action of trespass, for an alleged illegal arrest, false imprisonment, and alleged assault and personal injury, brought by the appellee, Michael Smith, against the appellants, Gustavus A. Marsh and Robert N. Pollock. The defendants pleaded the general issue, and also a joint plea justifying the alleged trespasses. The cause was tried before the court and a jury, and a verdict for $200 found for the plaintiff, upon which the court rendered judgment, and the defendants appealed to this court.

Messrs. WILLIAMS & CLARK, for the appellants.

Mr. A. M. CRAIG and Mr. P. H. SANFORD, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

This was an action brought to the circuit court of Knox county, by Michael Smith, against Gustavus A. Marsh and Robert N. Pollock, for trespass assault and battery, and false imprisonment, in which such proceedings were had that a verdict and judgment were entered against the defendants for $200.

To reverse this judgment, the defendants appeal to this court.

It appears, Marsh, one of the defendants, claimed to act as marshal, and Pollock as a policeman, of the city of Galesburg, and in the exercise of their functions, arrested the plaintiff, who was found after night, intoxicated, and in a suspicious condition in respect to a trunk of the value of $25—so suspicious as to induce these officials to arrest him and put him in jail, and take him before a magistrate for a felony, who, upon examination, discharged him. Nothing of a willful or harsh character was manifested by the defendants, and the evidence leaves the strong impression they acted honestly, from convictions of their duty in the premises. But the appellee contends

they were not officers having, *ex officio*, the authority to arrest a party without warrant.

The fact, whether they were officers legally appointed, could not be tried in this action. They justified the act of arrest by the fact they were, one the marshal and the other a policeman of the city of Galesburg, duly appointed. They were appointed to those offices respectively, and we think Pollock established his position by the evidence. The ordinance of October 19, 1857, being No. 19 of the series, creates a police department, to consist of the mayor, marshal, and such policemen as then were, or might thereafter be, appointed. Sec. 2, gives the appointment of the policemen to the council or mayor. Sec. 3, gives the mayor a general supervision and control of the police. Sec. 4, defines the duties of city marshal, and in case of necessary absence of any policeman, may appoint a temporary substitute, and is to report to the council each month the number of days and nights each policeman has been on service. Sec. 5, requires all the members of the police department to preserve order, peace and quiet throughout the city, to the best of their ability, and arrest any person found at any time, day or night, in a state of intoxication, in any street, &c., or exposed place in the city. If the arrest is made at night, and when the police court is not in session, the officer is required to convey the party to the city jail, and detain him until the opening of the police court, unless bail is given.

Pollock was appointed assistant policeman by the mayor, in June, 1867, to assist the marshal, and to hold the office until ousted by the council. The council sanctioned the appointment, by paying the bills Pollock presented for his services, and he continued to act without question, and was recognized by the mayor as an officer, and he had given him orders as such.

We think this proof was sufficient to show that Pollock was a police officer, duly appointed. The ordinance does not require that policemen should be commissioned.

As to Marsh, there is no question but he was the city marshal, duly appointed and commissioned.

This being the position of the defendants, some evidence should have been given that they had in the arrest of the plaintiff exceeded their authority. The ordinance authorized either of them to arrest an intoxicated party and found in that condition in a public street, and duty required them, if they knew a felony had been committed in their jurisdiction, and there was good reason to suspect a particular person as being the guilty party, to arrest him and take him before a magistrate for examination. But there must be a strong conviction from the circumstances, that the party arrested was the felon, for if it should appear there were no such circumstances, a jury can exercise a wide and liberal discretion as to the damages they will give the injured party. The unlawful arrest of a free citizen, finds no favor with courts, juries, or with the public at large, and if officers clothed with brief authority, shall indulge in it as a luxury, they must expect to pay for it.

But we do not design going into an examination of the merits of the cause, as we are of opinion the judgment must be reversed, on the plaintiff's fourth instruction. It is this:

"The jury are instructed that it is for them to determine, from all the evidence before them, whether the defendant, Pollock, was, at the time of making the arrest, a duly and legally appointed policeman of the city of Galesburg, and if he was not, the jury will find for the plaintiff as against said Pollock."

The instruction was hardly just to the policeman. The question should not have been left to the jury without an explanation from the court, as to what constitutes such appointment. Pollock had the appointment from the mayor, and the council and mayor had, since the appointment, recognized him

as a policeman, and that was evidence he was an officer *de jure*, and the court should have so told the jury.

For the error in giving the fourth of plaintiff's instructions, the judgment is reversed and the cause remanded.

Judgment reversed.

RICHARD AMMERMAN

v.

ROBERT TEETER.

1. NEW TRIAL—*verdict against the evidence.* In this case a new trial was awarded on the ground that the verdict was against the evidence.

2. INSTRUCTIONS—*naming a witness—and directing the attention of the jury to his conduct while testifying.* An instruction is not objectionable for the reason merely that it points out a witness by name, and directs the jury to take into consideration his conduct while testifying, as affecting his testimony. Where such an instruction is given, this court will presume that the manner of the wit ness justified and called for it.

APPEAL from the Circuit Court of Iroquois county; the Hon. CHARLES H. WOOD, Judge, presiding.

The opinion fully states the case.

Messrs. BLADES & KAY, for the appellant.

Messrs. ROFF & DOYLE, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This controversy arises on small accounts of the parties. Appellant claims that appellee owes him a few dollars, while appellee insisted he owed him nothing over and above the seven dollars which he tendered before suit was brought. Before the justice of the peace it seems, from the statements of appellee in giving his testimony, that he recovered a judgment of nine dollars. On the trial of the appeal in the circuit court the jury found a verdict in favor of appellee. Appellant brings the case to this court alone on the bill of exceptions by stipulation, and urges a reversal because the evidence fails to sustain the verdict, and because of the instructions given. We have looked into the bill of exceptions in connection with appellant's argument, appellee having filed none which has come to our hands.

Taking the evidence in its most favorable light to appellee, we are unable to see, even if we should include the seven dollars tendered, and which he says was left with the clerk for appellant, that he has paid the latter his due by seven or eight dollars. It appears that after the account of appellee had run for some time, appellant offered to pay twenty dollars in full, and after hesitation, appellee, a few days subsequently, accepted that sum. Appellant proved his account, which had accrued subsequently to that date, amounting to about thirty dollars. To meet this, appellee proved that he had furnished appellant some pie-plant, which, according to his own statement, could not have amounted to more than perhaps five dollars, and he paid appellant five dollars, and at his request paid Freeman six dollars, which would in the aggregate amount to sixteen dollars, to which, if we add the seven dollars left with the clerk as the tender, there would still be a balance due appellant.

If we were to allow five dollars per day for the labor performed by appellee in working on the artesian well and in harvesting the millet, the three dollars for removing the tools, pie-plant, money paid, and the seven dollars tendered, then the accounts would be about square. But we have seen that

appellee received twenty dollars in full for the labor on the well, in saving the millet, and for removing the well tools, by which he deducted eight dollars, and the evidence did not warrant the jury in allowing that sum on the trial below, and in doing so they manifestly acted against the evidence of a settlement of accounts up to that time. In this there is error.

The third of appellee's instructions is objected to because it names appellee and informs the jury that if they believe that he manifested anxiety to tell more than asked, and was ready to answer questions propounded by his own attorney, and was reluctant to answer questions asked by the opposite attorney, the jury might consider those facts in connection with his interest in the result of the suit, for the purpose of determining the weight to which his evidence was entitled. We perceive no error in the instruction. If such was his manner and action, it was the duty of the jury to consider it as affecting his testimony. The instruction left it to the jury to say whether such was the case, and as intelligent men, we must conclude that they were capable of determining the question, and would not discredit his evidence simply because the question was left to them for determination. It might be preferable to so frame an instruction as not to name the witness. But we must presume that the judge trying the case would not give such an instruction unless the manner of the witness justified and called for it. We discover no error in giving this instruction, but for the error indicated, the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

Syllabus. Statement of the case.

WILLIAM SMITH

v.

SUEL WRIGHT *et al.*

1. TITLE—*fraudulently obtained—held in trust for owner.* Where a person entitled to a soldiers' bounty land warrant, employed another to obtain the warrant for him, and the person so employed, by fraudulent means, procured the land to be located under the warrant, in his own name, he will hold the title as a trustee for the rightful owner.

2. PURCHASERS—*from the respective parties—of their rights and liabilities.* A purchaser of the land thus situated, from the equitable owner thereof, may maintain a bill against the party who obtained the title fraudulently, and those claiming under him, who are not innocent purchasers, and for a valuable consideration, for the purpose of establishing the fraud, and enforcing the trust in his favor.

WRIT OF ERROR to the Superior Court of Chicago.

This was a bill in chancery in the Superior Court of Chicago, exhibited by William Smith against Suel Wright, Patrick Rourk, James M. Adsit, and the Trustees of Schools of township 24, north range 6 in Grundy county.

The bill alleges, that one Lewis P. Holmes had a discharge from the army, having been enlisted as a soldier therein, and was entitled, by act of congress, to a bounty in land, and having his discharge in his possession, he applied to Adsit to procure for him his land warrant from Washington; that Adsit undertook the service, and prepared the necessary papers and affidavits for Holmes to sign and swear to, and at the same time, made out a power of attorney for Holmes to sign, authorizing the assignment of the warrant when it should issue, but leaving in the same, at the time it was signed, blank spaces for the date of its execution, the number and date of the warrant, and the name of the person to execute the power, to be inserted, which Holmes signed, and in that condition it was

acknowledged before a notary public. This blank power of attorney was signed by Charles Farwell and J. M. Adsit, as subscribing witnesses.

The bill charges that Holmes was unacquainted with the papers necessary to be made out to obtain the warrant, and Adsit represented himself to him as familiar with all the forms and steps necessary to that object, in which Holmes confided, and relied upon Adsit exclusively in the matter. That Adsit represented to Holmes that the power of attorney in its then condition, was a paper necessary for him to execute to procure the warrant, and under that representation, he executed it, believing it to be of that character; and he alleges that thus, Adsit procured Holmes, by fraud, misrepresentation and circumvention, to sign the power of attorney, and that he signed it without any knowledge of its tenor and effect, and without any intention to give Adsit or any other person, any power to sell his land warrant, or the land that might be located under it. That this power, with the blanks not filled, was signed and left in the possession of Adsit, before the warrant was issued; that about the 18th of August, 1848, a land warrant was issued to Holmes for 160 acres of land, for his services in the Mexican war, in pursuance of this application, and the certificate of such issuing was forwarded to, and received by, Adsit, who, thereupon, attached to it the power of attorney, and having filled the blanks for the number and date of the warrant, with the actual number, 23,129, and the date, August 18, 1848, thereof, and the blank of the person to create the power, with the name of L. D. Hoard, and the date of the power with the date of August 30, 1848, and on that day procured Hoard, without any ratification of the power by Holmes, and without his knowledge or consent, or his attorney in fact, to assign and transfer the land warrant so received by Adsit, to Winn Adsit, by a writing endorsed thereon, and purporting to be executed in the presence of James Long and J. F. Waite, as witnesses, and on the 5th of September, 1848, Adsit located

the land warrant at the Chicago land office, on the land described in the bill, in the county of Grundy, for which a patent was issued to Adsit, as assignee of Holmes, on the 1st of June, 1850. The bill alleges, that at the time the power of attorney bears date, Holmes had not attained his majority, and did not become 21, until about the 1st of October, 1856, long after the land was located under the warrant, and that soon after Adsit had sent the papers to procure the warrant, and about the time it should have been received, Holmes applied to him for it, and Adsit refused to let him have it, and then, for the first time, set up the claim that it had been sold to him by Holmes, and refused to give him any information about it, and Holmes, for several years, was unable to get information about it; that afterwards when Holmes became of age, about the 24th of October, 1850, by deed of that date, he conveyed the land to the complainant, and the deed was recorded November 8, 1853; that Adsit, by deed dated September 6, 1848, conveyed the south-west 40 acres of the south-east quarter, to the defendant, Wright, who was in possession, and by deed dated May 1, 1849, conveyed the north half of the quarter-section to James Craig, who, by deed dated December 21, 1850, conveyed it to Patrick Rourk, who was in possession, and Wright had mortgaged the part conveyed to him, by deed dated April 14, 1853, to the Trustees of Schools, defendants. Complainant further charges, that by reason of such fraud and circumvention on the part of Adsit, the power of attorney was a nullity, and the persons purchasing the land from Adsit, are by law charged with notice of the fact of such nullity; that the fact of blanks being left in the power of attorney and certificate of acknowledgment, is evident from inspection; that the making sale of the land warrant before it issued, or the execution of any power of attorney authorizing the sale thereof, before the issuing of the warrant, is, by the law of congress, a nullity, and so, if Holmes did sell and knowingly execute the power, the same is void as against Holmes and

those claiming under him subsequent thereto, and that the power of attorney is a nullity, by reason of Holmes being under age when it was executed; that Adsit must be held to have acquired, held and located the warrant as trustee of Holmes, and that Holmes, before assignment to complainant, was entitled to demand from Adsit, and from all persons acquiring title from him, to convey the same to him, Holmes; that the patent issued to Adsit showed upon its face that it was to him as assignee of Holmes, under a power to L. D. Hoard from Holmes, and that all the defendants were thereby expressly charged with notice of the fact that Adsit derived his title to the land warrant under the power of attorney, and not by a direct conveyance executed by Holmes in person.

The bill waives answer on oath, and prays that Adsit may be decreed to have acquired this land to and for the use and benefit of Holmes, his heirs and assigns; that the several conveyances set forth, may be charged with the same trust, and the grantees therein to hold the same in trust for Holmes, his heirs and assigns, and be decreed to release to complainant, as assignee of Holmes, these lands, and to surrender the possession to complainant. An account of rents and profits is prayed, and also an injunction, and for general relief.

Wright answers and denies all notice, and alleges that he bought of Adsit, for a good, valuable and adequate consideration, to-wit, $50, without any knowledge or information of any transaction between Holmes and Adsit.

Rourk, answering, says, Adsit conveyed the north half to Craig, who conveyed it to him, Rourk; that Craig's purchase was *bona fide*, for the consideration of $100 paid by Craig, and without any knowledge, on the part of Craig, of any transaction between Holmes and Adsit, or of any fraud, &c.; that he purchased the land of Craig, for a good and valuable consideration to him paid, and without any knowledge or information on his part of any transaction between Holmes

and Adsit. They deny all knowledge of blanks being left in the power of attorney, &c.

Adsit denies in his answer, that he ever engaged to procure the land warrant for Holmes, but bought his discharge and the warrant to be obtained under it; admits the blank spaces left in the power of attorney, &c. He positively alleges the papers were made out in order that he should get the warrant for himself, and were in the usual mode of preparing such papers; that on the delivery of the papers, he paid Holmes $40 in full for his right to the discharge, and the land warrant that might be issued upon it; denies any misrepresentations, and again alleges Holmes sold the land warrant to him for $40; admits filling the blanks, and that Holmes did not, thereafter, re-acknowledge the power; denies he was not of age at the time, &c.; admits sales as charged in the bill.

A general replication was filed to these answers.

The bill was afterwards amended, by consent of parties, by inserting an offer to repay any sum of money that might have been paid by Adsit for Holmes, &c.

Proofs were taken, and they showed that Holmes was born May 21, 1828.

Lewis H. Holmes, by his deposition, taken by consent, proves all the material facts stated in the bill. He testifies he left his certificate of discharge with Adsit, at the time he came out of the service. He got out of money; went to Adsit and requested him to buy the warrant; he refused; then asked him to get the warrant for witness, and to let him have some money on it to get home with, which Adsit finally consented to do, and which witness told him he would repay when he got his warrant. Adsit then requested him to make out a power of attorney for him to get the warrant, which witness did, but the import of the writing he did not know, for the reason he did not read it. These are all the papers he recollects of making; is not certain but that he made oath to his identity, age and name; went to the clerk's office and made

oath to a paper. Adsit gave him a check for between $30 and $40, and said it would take three or four months to get the warrant. Witness told him he would return the money when he got the warrant. This was in the fore part of July, 1848, at a place Adsit called his office, on Clark street in Chicago. There was present another man witness did not know. Some time in the month of August following, witness called on Adsit at his office, and demanded the warrant. Adsit said he had no warrant for him. He told Adsit he had the money to pay him, and also for getting the warrant. Adsit said he never had done any business for him. Thinks there were others in the office besides a young man, Halifor, himself, and Adsit.

This witness was cross-examined as to his interest in the suit, and denies all interest. States he sought information from Mr. Wentworth, the member of congress from the district, about the warrant, and he wrote him the warrant had been issued, and advised him to wait until the warrant was returned.

After this deposition was made, Holmes executed to complainant a release, which it was agreed between the parties should have the same effect as if executed and delivered before the taking of the deposition. The release was dated April 9, 1855, and releases the complainant from all trusts, equities and rights, whether resulting or otherwise growing out of the conveyance of this land by Holmes to Smith.

The cause was heard on bill, answers, replications and proofs, and a decree entered dismissing the bill.

Mr. W. T. BURGESS, for the plaintiff in error.

Messrs. KING & SCOTT, the defendants in error.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

The facts stated in the bill are fully proved by Holmes, a prominent actor in them, and as his testimony is not contradicted by any evidence, we do not see how the court could have avoided decreeing in his favor. His statement is a very plain and a very natural one, and is in no way weakened by any established fact in the cause, and it must be regarded as the true version of the transaction, and Adsit must be adjudged the trustee of the land, holding for Holmes' benefit, and that of his heirs or assigns. Complainant is his assignee by deed duly executed and recorded.

As to the other defendants, there is no proof whatever they are innocent purchasers, and for a valuable consideration. Such proof is indispensable. *Chaffin* v. *Heirs of Kimball*, 23 Ill. 39; *Powell* v. *Jeffries*, 4 Scam. 387.

We make no point of the fact that Holmes was not of age when he executed the blank power, nor on the fact that the law of congress forbade a sale of the warrant before it was issued, since, admitting all this to be regular, we are satisfied from the facts in the case, that Holmes never sold or intended to sell the warrant to Adsit, and that all pretences of that kind have no foundation to support them. It is a clear case, from the proof, for the complainant, as he had a right to obtain the conveyance from Holmes, when of age, and establish the fraud in a court of equity, and be protected in his rights. *Whitney* v. *Roberts*, 22 Ill. 381.

The decree of the superior court dismissing the bill, is reversed, and the cause remanded.

Decree reversed.

HARRIET A. YOE, Impleaded, etc.

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. EVIDENCE—*in criminal cases—of the right to show the character of a witness—in a capital case.* Where, upon the trial of a capital case, a witness, who had acted as a detective, was asked the question by the prisoner's counsel, upon cross-examination, "What is the character of your associates, in your business as a detective?" *Held*, that the inquiry was objectionable, as tending to degenerate into investigations wholly foreign to the matters in question.

2. SAME—*medical books—extracts read therefrom—not evidence.* And in such case, where the State's attorney, in his argument to the jury, read from medical books not in evidence, or proved to be authority upon the subject, it was the duty of the court to instruct the jury that such books were not evidence, but theories simply, of medical men.

3. SAME—*testimony given in another case—and in another State—inadmissible.* It was error for the court to permit to be used in evidence against the prisoner the testimony of a professor of chemistry, given in another case and in another State, and reported in the Criminal Reports, no opportunity having been had either to cross-examine such witness or to meet his testimony by other evidence.

4. TRIAL—*in criminal cases—improper conduct of counsel in address to the jury—duty of court.* And where, in a capital case, counsel, in his argument to the jury, made a statement, against objection, that he had a witness by whom he could have proved a certain declaration made by the prisoner, stating it, but that she was sick, such declaration being a serious admission against him: *Held*, that such conduct was improper, and that the court should have excluded the statement from the jury.

5. CRIMINAL LAW—*accessory equally guilty—distinction between accessories before the fact and principals abolished—not after the fact.* Under our statute, the distinction between accessories *before* the fact and principals, is abolished, but this is not true as to accessories *after* the fact.

6. SAME—*accessory after the fact—may be convicted—though indicted as a principal.* Under our criminal code a party may be convicted as an accessory after the fact, and punished accordingly, though indicted as a principal.

7. TRIAL—*in criminal cases—rights of accused.* In cases of this character, where the proof showed that, if accused was guilty at all, she could only have been so as an accessory after the fact, it is proper and right for the court, in its

instructions to the jury, to inform them, that if the prisoner had given any explanation of the circumstances proved against her, showing them to be consistent with innocence of the charge, they should favorably consider them.

8. EVIDENCE—*admissions—weak evidence—except where made with a full knowledge of all the facts.* Admissions may be weak, or the strongest kind of evidence. Of the latter, when the party making them has full knowledge of all the facts.

WRIT OF ERROR to the Circuit Court of Livingston county; the Hon. CHARLES R. STARR, Judge, presiding.

The opinion states the case.

Messrs. HURD, BOOTH & KREAMER, for the plaintiff in error.

Mr. R. G. INGERSOLL, Attorney General, for the people.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

The plaintiff in error, Harriet A. Yoe, was indicted in the Livingston Circuit Court, jointly with one John W. Youmans, for the murder of James Yoe, her husband. Youmans escaped arrest by flight, and the plaintiff in error, on her trial, was found guilty of manslaughter and sentenced to confinement in the penitentiary for eight years.

To reverse this judgment the record is brought to this court by writ of error, and various errors assigned.

The points made upon the record are that the witness, Haskins, who acted as "a detective," should have been required to answer the question of the defendant's counsel, as to what was the character of his associates in his business as a detective.

The plaintiff's counsel argues, that in a capital case, the prisoner had a right to show the character of the witness, for the purpose of affecting the credit to be given his testimony. Though much latitude is allowed, on cross-examination, in a capital case, we cannot perceive the necessity or propriety of

this inquiry, and if pressed, might degenerate into investigations wholly foreign to the matter in controversy.

Another point made is, that the attorney for the people was permitted, against the objections of the prisoner, to read to the jury copious extracts from medical works, which had not been introduced in evidence, and which had not been proved by any witness to be authority, and to state to the jury that what he had read was authority upon the subject of poison by arsenic; and further, that the court allowed the State's attorney to read to the jury, against the objections of the prisoner, the evidence of Charles H. Porter, who, as professor of chemistry, had given testimony in the case of *The People* v. *Mary Harting*, 4 Parker's Crim. Rep. 297, as evidence in the case on trial.

These were errors. If the State's attorney in such a case, or in any case, read from medical books, in his argument to the jury, the court should instruct them that such books are not evidence, but theories simply, of medical men. To permit testimony given in another State to be used as evidence against a prisoner on trial in this State, was the height of injustice, as the prisoner had no opportunity to cross-examine the witness, or to meet his testimony by other evidence. It may be that Mr. Porter's ideas were all perfectly correct, but they were not proved to be so—there was no evidence before the jury that they were correct. The symptoms of poisoning by arsenic are various, and what they are, are facts which must be proved by competent testimony, like any other fact in the case.

Again, the court should not have permitted the State's attorney to make to the jury, in his closing argument, the statement that he had a witness by whom he could prove a certain declaration of the prisoner, which must have fallen upon the jury with crushing effect. It was not legitimate argument for the State's attorney, and was so out of place in a capital case, that the court should have excluded it from the jury.

The principal question, however, made upon the record is, can a party indicted for murder, be found guilty as an accessory after the fact?

By our statute, an accessory before the fact is considered as a principal, and is punished accordingly; an accessory after the fact, is punishable by imprisonment for a term not exceeding two years, and fined in a sum not exceeding five hundred dollars, in the discretion of the court.

It becomes necessary to discuss this proposition, in view of the verdict found in this case and the judgment, as the case will be remanded for a new trial.

It is apparent from the verdict—a sentence of eight years in the penitentiary—that the prisoner was convicted of manslaughter, of the guilt of which there is not the slightest evidence. She is a murderess, or an accessory after the fact. There is no middle ground upon which she can stand.

The jury, perhaps, were in some degree influenced to this conclusion by the fourth instruction given for the people, in which they were told that in this State the distinction between principal and accessory was abolished, and that they were deemed principals and punished as such.

This is true only as it relates to accessories before the fact. The jury being told that the distinction between a principal and accessory after the fact was abolished, that as they could not find her guilty as principal, they would find her guilty of manslaughter, whereas, if they had been properly instructed, that she could be punished as an accessory after the fact, of which there is some evidence, the jury would have so found.

We can perceive no reason why, under our statute and practice in criminal cases, an accessory after the fact should not be convicted before the principal is tried. In this very case, the principal criminal has escaped. Does not justice demand that one who acted a subordinate part in the tragedy shall be punished according to her offense?

It has been often decided by this court that a party indicted for murder may be found guilty of manslaughter, and one indicted for burglary may be convicted and punished for larceny.

The only reason urged why this may not be, is, that the party is taken by surprise, and not understood to be prepared to defend against a charge not specifically made; yet it is the constant practice in our courts.

By analogy, then, authority on the point not being cited, we are of opinion, a party may be convicted as an accessory after the fact, though indicted as principal, and punished accordingly. The principal in this case may never, and probably never will, be arrested. If the prisoner did know of his guiltiness, and failed to communicate it to a magistrate, she has incurred the penalty of the law, and should suffer the punishment the law attaches to her crime. It was error to give the fourth instruction as given.

It is also claimed by plaintiff in error, that the court erred in refusing the sixth and seventh instructions asked by her. Without saying the instructions should have been given as framed, we are of opinion the prisoner was entitled to the benefit of that acknowledged principle of law, as of justice, that if she could give an explanation of circumstances proved against her, showing them to be consistent with innocence of the charge made, the jury ought to consider those circumstances favorably. So, if the jury could be satisfied of the motives and reasons by which she was induced to apply to her daughter for testimony, or to flee, and that they were consistent with innocence of the charge, the jury should take the favorable view. Such is the humanity of the law. But the court, on its own motion, gave to the jury this instruction, which covers the ground of complaint. It is this:

"The jury are instructed, if they believe, from the evidence, that the accused believed that the circumstances surrounding

her were calculated to awaken suspicion against her, and that she was ignorant of the nature of evidence and the course of criminal proceedings, and under such belief she was induced by Youmans to fabricate testimony, they may take the facts into consideration in accounting for her conduct in so doing."

The court properly refused the ninth and tenth instructions as asked by the prisoner.

The presence of the influences named should be shown,—not their absence,—to justify a rejection of the testimony. As to the tenth instruction it may be said, in certain cases admissions are weak evidence; but again, under other circumstances, as when the party making them has full knowledge of all the facts, they are the strongest kind of evidence, for who, innocent of crime, and knowing himself to be so, would make guilty admissions against himself? Should he do so, the belief would be well founded that he was guilty, and his admissions were the result of conscientious compunctions.

For the reasons given, the judgment is reversed and the cause remanded, that a new trial may be had.

Judgment reversed.

CASES

IN THE

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

SEPTEMBER TERM, 1867.

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*James Mitchell *et al.*

v.

Thomas Deeds.

1. Constitutional law—*power of the legislature to validate an irregularly organized corporate body.* The legislature have the same power to ratify and confirm an irregularly organized corporate body, that they have to create a new one.

2. Statutes—*concerning the act of Feb.*, 1857—*confirming the acts of consolidation between certain railroads.* And by the act of February 14, 1857, confirming the consolidation before then entered into, between the Savannah Branch Railroad Company and the Racine & Mississippi Railroad Company, the corporate body

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*This and the following case were unavoidably omitted from the report of the other cases decided at the same term at which these were originally submitted.

which was organized in accordance with the act of consolidation, became legal, notwithstanding such organization may have been irregular.

3. CORPORATIONS—*corporate existence admitted—by a party who executes his note to such body.* And where a party, prior to the passage of the act of 1857, executed and delivered to the "Racine & Mississippi Railroad Company," the corporation organized under such act of consolidation, his promissory note, and which was afterwards, and before its maturity, assigned by the company, through its president: *Held*, in an action upon such note by the assignee, against the maker, that the defendant, by executing his note to the company, thereby admitted its corporate existence, and in order to avoid its payment for the want of a party with whom to contract, he must prove that no such body existed in fact.

4. PLEADING AT LAW—*of the plea of nul tiel corporation.* The rule is well settled in this State, that under a plea of *nul tiel corporation*, where an organization in fact, and a user is shown, the existence of the corporate body is proved.

5. SAME—*want or failure of consideration when pleaded—must be proved.* This court has said, that under the tenth section of the statute regulating negotiable instruments, where a want or failure of consideration is pleaded, it must be proved by the party alleging it. *Stacker* v. *Watson*, 1 Scam. 207, and *Topper* v. *Snow*, 20 Ill. 434.

6. SAME—*must be shown by a preponderance of evidence.* And in this case, such defense having been set up by the defendant, it devolved upon him to prove, that the plaintiff who received the note before its maturity, had notice of such defense at the time he so received it. This issue, like all other affirmative issues, should be proved by a preponderance of evidence.

7. FRAUD—*what constitutes.* To constitute fraud, there must be a willful, false representation of facts, or the suppression of such facts as honesty and good faith require should be disclosed.

8. SAME—*false representations.* And in such case, when the defendant also set up as a defense that the note was procured from him by the company, by means of false and fraudulent representations made by its officers, to the effect that these companies had *legally* consolidated, and the proof showed that articles of consolidation between the parties had been drawn up and signed, and officers of this new organization had been elected, and had entered upon the discharge of their duties: *Held*, that this was sufficient to repel the presumption of false representation that the companies had *legally* consolidated, unless the persons making them, knew that the consolidation was illegal and unauthorized.

9. CORPORATIONS—*user of franchises—the presumption in a collateral proceeding.* A user of franchises raises the presumption in a collateral proceeding, that a corporation is in the rightful exercise of such power.

10. And in this case, an organization in fact, and a user of franchises usual to such bodies having been shown, it was error for the court to refuse an instruction

which fairly presented the question, whether the officers making the representations concerning the consolidation of the companies, knew at the time that no consolidation had been effected.

11. FRAUD—*fraudulent representations—must be proved like any other fraud.* And the defendant also having set up as a defense, that he was induced to execute said note, by means of false and fraudulent representations made to him by the officers of the company, concerning its solvency, and the progress of its road to completion, he must prove it, otherwise he must fail on this issue. Where fraudulent representations are relied upon as a defense, they must be established like any other fraud.

12. CORPORATIONS—*authority of the president to sell and assign the securities of a corporation.* Nor can it be objected by the defendant, that the assignment of such note by the president, was without authority, the proof showing, that by a resolution of the board of directors, adopted prior to the assignment, the president was authorized to pay off any debts owing by the company, in any securities or other property of the corporation, and there being no evidence that it was assigned by him to plaintiff for any other purpose than that expressed in such resolution.

13. SAME—*may appoint any person to dispose of their property or transfer their negotiable securities.* A corporation may, unless otherwise provided by its charter, by resolution or by-law, appoint any person an agent, for the purpose of transferring or disposing of its property or negotiable securities.

14. No officer of the corporation possesses such exclusive power, unless conferred by charter.

15. And in the absence of both statutory authority and regulations of the corporate body, if the proof showed that the president was in the habit of exercising such power, then his authority so to act might be inferred.

16. The doctrine seems to be well settled, that the president of a corporate body may perform all acts which are incident to the execution of the trust reposed in him, such as custom or necessity has imposed upon the office, and this without express authority.

17. And it is immaterial whether such authority exists by virtue of his office, or is imposed by the course of the business of the company. *C., B. & Q. R. R.* v. *Coleman*, 18 Ill. 397.

WRIT OF ERROR to the Circuit Court of Jo Daviess county; the HON. BENJAMIN R. SHELDON, Judge, presiding.

The opinion states the case.

Mr. THOMAS J. TURNER, for the appellants.

Mr. J. H. KNOWLTON, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by James Mitchell, Roderic Richardson, Holden Putnam and John Page, in the circuit court of Jo Daviess, against Thomas Deeds. The action was for the recovery of two promissory notes executed by defendant to the Racine & Mississippi Railroad Company, and endorsed to plaintiffs before their maturity. There were several defenses interposed, and on the trial in the court below, the jury found for the defendant. To reverse that judgment, the cause is brought to this court on error.

We will first determine whether this company had such an existence as authorized them to take these notes and to assign them. It is insisted, that the articles of consolidation executed by the two companies, having no seal attached, was void, and failed to produce the corporate body intended to have been organized by these articles.

An act of the general assembly, approved on the 14th day of February, 1857, more than one year after the articles of consolidation were executed, declares that the consolidation is ratified and confirmed. It will not be denied that the general assembly has the same power to confirm and validate an irregularly organized corporate body, as it has to bring into existence a new one. It must, therefore, be held that this company became legal by this act, if not so previous to that time.

It is, however, said, that the notes in controversy having been executed on the 9th of May, 1856, about nine months before this act was passed, were not affected by its provisions. This is no doubt true, but appellee admitted the existence of the body by giving them. It has been repeatedly held, tha

under a plea of *nul tiel corporation*, when an organization in fact and a user is shown, the existence of the body is proved. In this case, the proof shows an organization in fact, by the election of officers, who acted for the body, and that they used and enjoyed the franchises of a railroad company organized by the laws of the State, and not only so, but appellee fully admitted the existence of such a body, by executing to it the notes in question.

The 10th section of our statute regulating negotiable instruments, gives the defense of a failure of consideration, in whole or in part, or the want of a consideration, but saves the rights of *bona fide* holders by assignment before they fall due. It has been held, under this section, that when the want or failure of consideration is pleaded, it must be proved by the party who interposes the defense. *Stacker* v. *Watson*, 1 Scam. 207; *Topper* v. *Snow*, 20 Ill. 434. As a general rule, subject, it may be, to a few exceptions, the party who holds the affirmative of an issue, is held to its proof. It, then, devolved upon appellee to prove the averment, that appellants had notice of the defense set up, as they were purchasers of the notes by assignment before they became due. Even had it appeared there was a want of consideration, or that it had failed in whole or in part, still it was indispensable that it should have been proved that appellants had notice of the fact when they received them, to have constituted a defense. This issue, like all other affirmative issues, should be proved by a preponderance of evidence.

The notes were endorsed by Durand, the president of the company; and to establish his authority to make the assignment, appellants read in evidence two resolutions of the board of directors of the company. The first was adopted on the 28th of January, 1858, and authorizes the president and vice president of the company to enter into such arrangements with the creditors of the company and the holders of its securities, for such relief as the circumstances and the necessity of

the company might require, and to make such stipulations and agreements as they might deem proper and expedient. The other resolution was adopted on the 26th of October, 1859. It authorizes the president to pay off any debts owing by the company, in any securities or other property of the corporation, at such rate as he may deem advisable. This, so far as we can see, was the last action taken by the board in reference to conferring power to dispose of the securities of the company. By this latter resolution, Durand had ample power to sell these notes for the purpose of paying any portion of the indebtedness of the corporation, and there is no evidence in this record that they were sold for any other purpose. It was prior in date to the assignment; and the adoption of this resolution, by fair intendment, abrogated so much of the former one as was repugnant to its provisions, and invested the president with the sole power to act, and hence this last delegation of power must control.

A large number of instructions were asked by each party, on the trial below. A number of those asked by appellants were refused, and exceptions duly taken at the time. Of that number is the 11th, which is this:

"The jury are instructed that, though they should believe, from the evidence, that the instrument for consolidation between the Wisconsin Railroad Company, and the Rockton & Freeport Railroad Company had no seal attached; yet, that if they also believe, from the evidence, that said companies were authorized, under the laws of Wisconsin and Illinois, to consolidate; that it was the *bona fide* intention of the companies to consolidate conformably to such authority; that they believed they had so consolidated; that under said instrument of consolidation the said companies did in fact unite in constructing and operating a continuous line of road in said States; that no stockholders ever objected to such consolidation as to such united construction and operation; and that such consolidation

has never been judicially declared invalid, or attacked in any proceeding undertaken directly for that purpose, then it is for the jury to say whether there was fraud, either actual or constructive, in the representations of the railroad company, to the effect that it had the right to construct and operate a railroad in the State of Illinois."

The pleas had set up and relied upon fraudulent representations, as a defense to these notes, and in maintenance of the pleas, it was insisted, that the original companies were not legally consolidated, and that representations that they had become consolidated was a fraud upon appellee.

To constitute fraud, there must be a willful, false representation of facts, or the suppression of such facts as honesty and good faith require to be disclosed. If, then, the officers attempted, in good faith, to consolidate these roads, and the persons who represented that they had accomplished that object, did so in good faith, an essential ingredient of fraud was wanting, and that defense was not made out under the plea.

Again, a user of franchises raises the presumption, in a collateral proceeding, that a corporation is in the rightful exercise of such power. The averment in the declaration that the body is an incorporation, is sustained by proving that they are exercising corporate rights and privileges. But when the government proceeds against such a body, by *scire facias* or *quo warranto*, to terminate the existence of a body because it is alleged they have usurped their franchises, then they are bound to show a sufficient grant to authorize their organization, and also, that they have conformed to all of the material requirements imposed by their charter, or if not, that their organization has been properly legalized.

The law is well settled in this State, that under the plea of *nul tiel corporation*, the plaintiff need only show an organization in fact, and a user of corporate franchises. *Marsh* v.

Astoria Lodge, 27 Ill. 421; *President and Trustees of Mendota* v. *Thompson*, 20 Ill. 197; *Town of Lewiston* v. *Proctor*, 27 Ill. 414; *Hamilton* v. *Town of Carthage*, 24 Ill. 22. In this case, there had been an effort to consolidate the two roads. Articles had been drawn up and signed; officers had been elected and had entered upon the discharge of their duty, and were engaged in the construction of the road, which was certainly sufficient to repel the presumption of fraudulent representations, that the roads had consolidated, unless the officers knew that the consolidation was illegal and unauthorized.

Having given these notes to this company, appellee admitted the existence of the corporate body, and it devolved upon him to prove that no such body existed in fact, to avoid the payment of the notes for the want of a party with whom to contract.

There was evidence in this case tending to show user of franchises usual to such bodies, and the question, whether the existence of the corporation had been shown, was fairly before the jury, and the instruction fairly presented the question, whether the officers of the road had knowledge that no consolidation had been effected, and it should have been given.

The court below likewise refused to give appellants' 20th instruction. It is this:

"In order that the defendant may avail himself of the defense set up in the second and third pleas in this case, it must not only appear that the statements and representations set forth in said pleas were made, but it must also appear that such statements and representations were false; and that the parties making them knew them to be false at the time they were made."

The special pleas filed by appellee, contain the matter of several separate defences. Among the averments is one that false and fraudulent representations were made by the officers

of the company, as to its solvency and progress to completion, and that they were relied upon by appellee as true when he gave these notes. He avers that the company had practiced fraud to induce him to execute the notes, and that he relied upon the false and fraudulent representations thus made, and having made the averments, he must prove them, and failing to do so, he must fail on this issue. Appellee has taken upon himself the burthen of proving the representations to be false, and that the officers making them knew the fact, and that appellants were informed thereof when they took the assignment of the notes. This instruction fairly presents the question, whether the statements were made, if so, whether they were false, and the officers acting for the company knew it. The instruction was proper, and should have been given. Fraudulent representations, relied upon as a defense, must be established, like other fraud.

In so far as the appellee's instructions contravene the 11th and 20th of appellants' instructions, they were erroneous, and should not have been given without proper modifications. In giving them the court erred.

As to the 2d instruction asked by appellants, it was calculated to mislead the jury, and was therefore properly refused. As we understand the law, a corporate body may, unless otherwise provided by their charter, appoint any member of the body, or other person, by their by-laws or by resolution, an agent to transfer or dispose of their property or negotiable securities. No officer of the body has that exclusive power, unless given by the charter. They may confer power on the president, treasurer, secretary, other officer or other person. But in the absence of both statutory authority and regulations of the body on the subject, the presumption might be indulged, that the president, as the head of the organization, would have authority, if incident to the organization, or in conformity to the usage and custom of business. The doctrine seems to be settled, that the president of a corporate

body being its head, and through him the usual affairs of the company are constantly performed, and such acts are incident to the execution of the trust reposed in him, such as custom or necessity has imposed upon the office, he may perform without express authority. And it is immaterial whether such authority exists by virtue of his office, or is imposed by the course of business of the company. *Chicago, Burlington & Quincy Railroad* v. *Coleman*, 18 Ill. 297. Had there been evidence that the president was in the habit of transferring such instruments, in the regular course of the business of the company, then his authority might be inferred, and the instruction would have been proper.

The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

SAMUEL VORIS *et al.*

v.

WILLIAM RENSHAW, JR.

1. DEEDS—*containing condition against a conveyance within a limited period—construction thereof.* Where the grantor in a deed, annexed to the grant a condition that the grantee should not convey the property, except by lease for a term of years, prior to a certain day named therein, and the grantee afterwards, and within the limited period, executed to a party a lease of the premises for 99 years, and also, at the same time, gave to him a bond for the conveyance of the property in fee, after the expiration of the limitation, and received from the purchaser the purchase price therefor: *Held*, that these acts of the grantee were not prohibited by the condition, and hence worked no forfeiture of the estate.

2. SAME—*condition to avoid an estate—construed strictly.* A condition to avoid an estate must be taken strictly. It cannot be extended beyond its express

terms. And when a party insists upon the forfeiture of an estate under a condition, he must bring himself clearly within its terms.

3. FORFEITURES—*not favored.* The law does not favor forfeitures, but refuses to enforce them, whenever wrong or injustice will result therefrom; and before a forfeiture will be enforced, a clear case, appealing to the principles of justice, must be established.

APPEAL from the Circuit Court of Peoria county; the Hon. SABIN D. PUTERBAUGH, Judge, presiding.

On the 26th day of April, 1850, George Morton, being the owner in fee of block 104 in Morton, Voris & Laviell's Addition to Peoria, conveyed the same to his son, Peter Morton, in consideration of one dollar and natural love and affection, and "upon this express condition, that the said grantee shall not convey the above property, except by lease for a term of years, to any person whomsoever, prior to January 1st, 1861."

On the 9th of July, 1853, Peter Morton leased the premises to William Renshaw, Jr., for ninety-nine years, and on the same day executed to Renshaw a bond, reciting that he had sold the property to Renshaw for the sum of $10,000, cash in hand paid, and conditioned that Peter should convey the same by deed to Renshaw after Jan. 1st, 1861, and before Jan. 1st, 1862.

Peter Morton died in 1857, intestate, leaving certain heirs at law, and in 1858 Samuel Voris took possession of the premises, claiming under those heirs.

In 1861, Renshaw exhibited his bill in chancery in the circuit court of Peoria county, against the heirs at law of Peter Morton, and Voris, to enforce his rights under his contract of purchase. An answer and cross-bill were filed by Voris.

Such proceedings were had, that in 1867 the cause came on for final hearing, and a decree was entered, that Voris take nothing by his cross-bill, and that the same be dismissed; that Voris should convey to Renshaw all the title to said land which he acquired from the heirs of Peter Morton, deceased, with

proper covenants against incumbrances done or suffered by said Voris, and that he surrender the possession of the same on or before the 27th of August, 1867; that defendants pay the costs, and that execution issue therefor; that in case of Voris' failure to make the deed or surrender the possession, the master should make the deed, and the sheriff should put Renshaw into possession.

Voris and his co-defendants thereupon took this appeal, and now insist that the transaction between Renshaw and Peter Morton was in violation of the condition in the deed from George Morton, and that Renshaw acquired no rights thereby; while, on the other hand, Renshaw contends the transaction was not in violation of such condition, and if the condition must be so construed it is void.

Mr. H. M. WEAD and Mr. D. MCCULLOCH, for the appellants, contended,

First, That the condition in the deed from George Morton to Peter Morton, that the latter should not convey until after a specified time, was valid and binding, citing 2 Cruise's Digest, ch. 1, p. 2, Title 13, sec. 1, and sections 9, 15 and 22 of the same chapter; 2 Bacon's Abr. (7th ed.) 130; *Doe ex dem. Gill and wife* v. *Pearson*, 6 East, 173; Co. Litt. 223, sec. 361; 1 Wash. on Real Prop. (2d ed.) 470; *McWilliams* v. *Nisby*, 2 Serg. & Rawle, 507; Shep. Touch. 131; *Gray* v. *Blanchard*, 8 Pick. 283; *Blackstone* v. *Davis*, 21 Pick. 42; *Jackson* v. *Schutz*, 18 Johns. R. 183; *Shackelford* v. *Hall*, 19 Ill. 212.

Second, The lease from Peter Morton to Renshaw for ninety-nine years, and the bond for a conveyance to be made after the time limited, were a violation of that condition. *Doe ex dem. Mitcheson* v. *Carter*, 8 Term R. 170; *Doe* v. *Hawke*, 2 East, 481.

Mr. T. LYLE DICKEY, for the appellee.

If the condition must be construed as contended for by counsel for the appellants, it is void. Greenleaf's Cruise, Title 13, sec. 22; 1 Hilliard on Real Prop., p. 369, ch. 27, sec. 20; Shep. Touch. vol. 1, p. 129, *et seq.*; Litt. Tenures, book 3, ch. 5, sec. 360; 2 Spence Eq. Jur. 89; *Hawley et al.* v. *Northampton*, 8 Mass. 37; *Hall* v. *Tufts*, 18 Pick. 455.

But the condition has not been violated. It must receive the most strict interpretation. Cruise, Title 23, ch. 2, sec. 1; 1 Shep. Touch. 133; *Lynde* v. *Hough*, 27 Barb. N. Y. 423; *Jackson* v. *Silvernail*, 15 Johns. 278; *Livingston* v. *Stickles*, 7 Hill, 255; *Crusoe* v. *Bugby*, 3 Wils. 234; 2 Wm. Bl. 776; *Doe* v. *Hogg*, 4 Dowl. & Ryl. 226.

Again, the clause in the deed from George Morton to Peter Morton, of April 26, 1850, is a *condition* and not a *limitation* of the estate. See Wendell's Blackstone's Com. 2d book, p. 155, top p. 154, ch. x,—and therefore a breach of the condition does not *ipso facto* terminate the estate granted by George Morton to Peter Morton, but the estate continues until George Morton shall declare the forfeiture. This *he* has *never* done, and the right to do so is personal and not transferable, and Voris has no power or authority to make such declaration. Shep. Touch. vol. 1, pp. 149, 153, top pp. 184, 278; *Nicoll* v. *N. Y. & E. R. R. Co.*, 12 Barb. N. Y. 460; *Underhill* v. *Sar. & Wash. R. R Co.*, 20 Barb. N. Y. 455.

Mr. JUSTICE WALKER delivered the opinion of the Court:

There is no dispute that George Morton was the owner of the block of ground in controversy, and that he, on the 26th day of April, 1850, executed a conveyance of the same to his son Peter. The consideration expressed in the deed was one dollar and natural love and affection. But the deed contained this clause:

"To have and to hold the premises with the appurtenances, unto the said party of the second part, and his heirs and assigns forever, upon the express condition, however, that the said party of the second part shall not convey the above described property, except by lease for a term of years, to any person whomsoever, prior to the 1st day of January, 1861."

It appears that on the 1st day of March, 1851, Peter Morton leased the property to B. C. Harris for the term of ten years, reserving an annual rent of fifteen dollars. Again, on the 9th day of July, 1853, he executed another lease on the same premises to appellee for the term of ninety-nine years, reserving a yearly rent of one dollar, and on the same day he also executed to him a bond for a conveyance of the premises in fee between the 1st days of January, 1861 and 1862, and received from appellee $10,000 as the purchase money. The bond and lease were duly recorded in the proper office, on the 13th day of July, 1853.

On the 2d day of November, 1853, Harris' interest in the premises was sold under an execution against him, and was purchased by appellee, and he received a deed for the same from the sheriff. On the 6th day of November, 1854, Harris assigned his lease to George Morton. Peter Morton died in the year 1857, unmarried, without children or descendants of children, and intestate. Samuel Voris subsequently obtained deeds for the conveyance of the premises from all of the heirs at law of Peter Morton, between the 20th day of August, 1858, and the 18th day of November, 1859, all of which were duly recorded prior to the 6th day of January, 1860. He also took possession of the premises in 1858, and has occupied them ever since, claiming to be the owner.

The case having been heard in the court below, the relief sought was denied and a decree rendered dismissing the bill, from which an appeal was prosecuted to this court, and the decree reversed and the cause remanded for further proceedings.

The cause was again tried upon substantially the same proofs, and a decree was rendered in favor of complainant, granting the relief prayed, from which the defendants below prosecute an appeal and ask a reversal.

Inasmuch as the lease from Peter Morton to Harris expired before these proceedings were commenced, it is not in the case, and can have no bearing on the conclusion at which we have arrived. The only question we propose to reconsider is the same that was presented and discussed when the case was previously before the court, and that is, whether the lease for ninety-nine years, and the bond for a conveyance, executed by Peter Morton to appellee, were in violation of the condition annexed to the conveyance from George to Peter Morton. Other questions are raised and discussed in the elaborate and very able argument filed by appellants, but after a full, careful and thorough examination of the case, in the light of the arguments and authorities cited, we deem it unnecessary to discuss any other question. And after the most mature reflection we have been able to bestow upon the case, we have arrived at the same conclusion that was announced when the case was previously before the court, but for different reasons from those then assigned.

Admitting that the condition is not repugnant to the estate, and is valid and binding, still the question is presented, whether, by executing the lease for ninety-nine years, and the bond for a conveyance after the time should expire, within which Peter Morton was prohibited from alienating, worked a forfeiture of the estate conveyed to Peter by the deed containing the condition. Conditions subsequent are not favored in law, and are construed strictly, because they tend to destroy estates; and a rigorous exaction of them is a species of *summum jus*, and in many cases hardly reconcilable with conscience. 4 Kent Com. 129. And as illustrating the rule, we find that it has been held, that where the condition is personal to the grantee, as that he shall not sell without leave,

the executors of the lessee not being named in the condition, may sell without incurring a breach. Dyer, 65; Moore, 11.

In Shep. Touchstone, vol. 1, p. 133, it is said:

"It is a general rule, that such conditions annexed to estates as go in defeasance and tend to the destruction of the estate, being odious to the law, are taken strictly, and shall not be extended beyond their words, unless it be in some special cases. And therefore, if a lease be made, on condition that if such a thing be not done, the lessor (without any words of heirs, executors, &c.,) shall re-enter and avoid it,—in this case regularly the heirs, executors, &c., shall not take advantage of this condition. So, if one make a lease for years of a house, on condition that if the lessor shall be minded to dwell in the house, and shall give notice to the lessee, that he shall depart,—in this case, if the lessor die, his heirs, executors, &c., shall not have the like advantage and power as the lessor himself, for the condition shall not be extended to them. And hence it is, that if a lease for years be made, on condition that the lessee shall not alien without license of the lessor,—in this case the restraint shall continue during the lives of the lessor and lessee, and no longer. And yet this rule hath an exception; for if a man mortgage his land to W. upon condition that if the mortgagor and J. S. pay 20*s.* such a day to the mortgagee, that then he shall re-enter, and the mortgagor die before the day; in this case J. S. may pay the money and perform the condition."

The rule is fully recognized in Litt. Ten., sec. 337; 1 Smith's Leading Cases, 20, p. 79, Am. ed., and the authorities there cited fully sustain it. In fact, the old books abound in cases that support the rule. And it is held that where there is a condition that the lessee shall not sell or assign, the sale by the assignee of a bankrupt lessee, or under an execution or other assignment in law is held to be no breach of the condition, *Philpot* v. *Hoar*, 2 Atk. 219; *Doe* v. *Bevan*, 3 M.

& S. 353; *Doe* v. *Carter*, 8 T. R. 57, unless such a sale is produced by the lessee in fraud of the condition.

In the case of *Cobb* v. *Prior*, 2 Scam. 35, it is held, that if a man devises land to his wife, during the minority of his son, upon condition that she shall not do waste, and dies, and the wife marries again and afterwards dies, and the husband commits waste after her death, the condition is not broken, because a condition to avoid an estate shall be taken strictly. In Dumpor's case, 4 Coke, 119, it was held that a condition in a lease, that the lessee or his assigns shall not alienate without special license of the lessor, is determined by an alienation by license, and no subsequent alienation is a breach of the condition, nor does it give a right of entry to the lessor. And in such a condition a license to one lessee is a license to all, or a license to alienate a part of the demised premises is a license to alienate the entire land.

In the case of *Snyder* v. *Hough*, 27 Barb. 415, it was held, that the extent and meaning of a condition, and the fact of a breach, are questions *strictissimi juris*, and a plaintiff, to defeat a condition of his own creation, must bring the defendant clearly within its letter. And in the case of *Emerson* v. *Simpson*, 43 N. H. 473, the same rule is announced, after a review of the authorities to which we have referred, as well as many others.

These cases, it is true, involve conditions contained in leases, and not a conveyance of the fee. The last case referred to, however, was where a forfeiture of the fee was claimed, because it was alleged that the condition of the grant had been broken. In that case there was a condition, that if the grantee should fail to keep up, at his own expense, forever, a good and sufficient fence between the land granted and other land specified in the condition, then the deed was to be void. And the court refer to the authorities we have cited, and apply the rule they announce, and decide it on them.

No reason is perceived why the rule should not apply in the one class of cases as well as the other. It is true, that in many, if not a large majority of cases, the fee conveyed is more valuable than a leasehold estate of the same or other property, but that cannot alter or modify the rule. The right to protection in the one is as sacred in the eye of the law as the other. The law does not favor forfeitures, and their prevention is within the protecting care of equity, whenever wrong or injustice will result from their enforcement; and to prevent their enforcement affords a large share of equity jurisdiction.

If we test the case at bar by the rule established by these authorities, it will be found that there has not been a forfeiture. The restraint was upon a conveyance of the property within a limited period. We must presume that the language employed was intended to prevent the transfer of the property or the title to it, in the ordinary manner, and by the usual and proper instruments employed for that purpose. And all know that such an end is usually accomplished by a deed which purports to convey the title. All know that a bond for a deed does not produce that result, nor does a lease for a term of years. Under no construction which can be reasonably given to this language can the lease for ninety nine years be held inoperative, or to have violated the condition. It expressly authorized it to be leased for a term of years, and this is such a lease. Nor is it an answer to say that he had already leased the premises for a shorter period of time. No person would contend that he was not fully empowered to execute a lease at the end of each year for the ensuing year, until the time expired that the condition prohibited a conveyance of the property itself. So far, then, from prohibiting the making of more than one lease, we have seen that he was authorized to make a number.

The language, we have seen, must be strictly construed, and the limitation or condition must have a literal construction.

When we apply, then, the strictest rules of law, in the language of the books, neither the bond nor the lease was a conveyance of the property. In a legal sense, a bond does not convey any title. It is but an obligation to convey at a future time. It is in no sense a conveyance, and we have seen that where a party is insisting upon the forfeiture of an estate, under a condition of his own creation, he must bring himself clearly within the terms of the condition. We have no right to extend the condition beyond its terms. We cannot say an act not embraced within the language, is within the spirit of the condition, and will be substituted for the act prohibited by the terms of the condition. To do so would be to give a liberal, instead of the strictest legal, construction. To say that, while the condition only imposed a forfeiture by an attempt to convey the property within the limited period, by an instrument capable of conveying it, yet it was forfeited by executing an instrument that does not convey, and, all know, does not have that effect, would be to give a liberal and not a strict construction.

The construction here given is no more strict than that given in Dumpor's case, *supra*. In that and numerous similar cases, the injury contemplated by the lessor, by a second assignment of a lease without his consent, was as great as would have been a first assignment, and yet, as he had failed to prohibit it by express terms in the condition, it could not operate to produce a forfeiture. So, of a condition that the term shall be forfeited in case the lessee shall under-let, in whole or in part, still, if he assign the whole term it does not work a forfeiture, because the language did not prohibit an assignment, although it might produce the same result that would ensue from under-letting. So, in this case, George Morton did not say, in the condition which he annexed to this estate, that Peter should not agree to sell and execute a bond for a conveyance at the expiration of the period he had limited. And we could not, under these authorities, hold

that a forfeiture had been incurred, unless the act had been prohibited by the condition.

Nor is it an answer to say, where the purchase money is paid and an obligation for a conveyance is given, that it is an equitable conveyance. It is true, that in equity it is a rule that what should have been done, will in that tribunal be considered as done, and hence it is called an equitable title. But it is only so far a title, that the court will enforce an agreement and compel a conveyance of the title, and will prevent the holder of a legal title from asserting and enforcing inequitable claims under it. But according to the ordinary and general use of language, it is not understood that real estate is conveyed by a bond for a title. Such is not the legal sense, nor is it the general understanding of the community; and we must presume that the language was used in its ordinary acceptation. But if we apply the technical meaning, real property can only be conveyed by deed, fine and recovery, or some of the modes of common assurance, and a bond for a conveyance is not of that character.

Inasmuch as equity does not favor forfeitures, but refuses to enforce them, unless it be to promote justice, and to prevent the perpetration of injustice and wrong, a clear case, appealing to the principles of justice, must be made out before a forfeiture will be enforced in that tribunal. In this case, appellee paid $10,000 as the price of the property, and, for aught that we can see, it was all that it was worth at the time. There is no evidence of any undue advantage, fraud or oppression, in procuring the lease and the bond. And the mere fact that it may be supposed that George Morton intended to prohibit, but did not, such a contract, did not, as we have seen, prevent appellee from so contracting, nor does it render the contract void.

Again, Voris seems to have acted upon the supposition that there had been no forfeiture. Had there been a forfeiture, the fee would have returned to and been re-invested in George

Morton, the grantor. But Voris purchased of the heirs at law of Peter Morton, evidently upon the supposition that he died seized of the title, and that the estate descended to his heirs. And as he acquired the legal title from them, he took it precisely as they held it,—a mere naked legal title, subject to appellee's equitable rights, acquired by the lease and the bond for a conveyance,—and he holds that title as a trustee. As appellee could, if Peter Morton were living, compel him to execute a conveyance under the bond for a title, his heirs inherited it in the same manner, and Voris took the title subject to the same liability to convey, and must, under the bill and proofs, be compelled to invest appellee with the legal title to the property, according to the prayer of the bill. And his cross-bill was properly dismissed.

For these reasons, the decree of the court below must be affirmed.

Decree affirmed.

A CASE

IN THE

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, 1863

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*JOHN PHILLIPS

v.

JOHN S. PHILLIPS.

1. PARTNERSHIP—*when it exists as to third persons.* Parties may so conduct themselves as to be liable to third persons as partners when in fact no partnership exists as between themselves. The public are authorized to judge from appearances and professions, and are not bound to know the real facts.

2. SAME—*as between the parties themselves.* But a partnership can only exist as between the parties themselves, in pursuance of an express or implied agreement to which the minds of the parties have assented; the intention or even belief of one party alone, cannot create a partnership without the assent of the others.

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*The publication of this case has been unavoidably delayed.

Syllabus. Statement of the case. Opinion of the Court.

3. PRACTICE IN THE SUPREME COURT—*of retaining a case for further proceedings.* A bill in chancery was exhibited asking for the dissolution of an alleged partnership between the complainant and the defendants, and that an account be taken. On an appeal to the supreme court, it was held there was no partnership, but the court allowed the bill to be retained, in order that the question might be presented, whether such a state of facts appeared from the record, as would entitle the complainant to compensation on the principle of a *quantum meruit*, and to have the cause remanded with leave to amend the bill for that purpose.

APPEAL from the Circuit Court of Cook county; the Hon. GEORGE MANIERRE, Judge, presiding.

This was a suit in chancery instituted in the court below by John S. Phillips, against John Phillips, and others. The bill alleges a partnership between the parties, asks that it may be dissolved, and for an account.

Upon the final hearing below, the court found that a partnership existed, and decreed that it be dissolved and an account taken.

The defendant, John Phillips, thereupon took this appeal. The only question presented is one of fact—whether a partnership did really exist.

Messrs. WOODBRIDGE & GRANT, for the appellant.

Mr. A. W. WINDETT, for the appellee.

Mr. CHIEF JUSTICE CATON delivered the opinion of the Court:

The only question in this case is one of fact. Was there a co-partnership between John Phillips and his four sons, or was he the sole proprietor of the business about which the controversy has arisen? It must be remembered in the outset, that this is a controversy *inter sese*, and is not between third parties and the alleged members of the firm. Parties may so conduct

themselves as to be liable to third persons as partners when in fact no partnership exists as between themselves. The public are authorized to judge from appearances and professions, and are not absolutely bound to know the real facts, while the certain truth is positively known to the alleged parties to a firm. A partnership can only exist in pursuance of an express or implied agreement to which the minds of the parties have assented. The intention or even belief of one party alone, cannot create a partnership without the assent of the others. If John S. Phillips designed and really believed that there was a partnership, but to which his father and brothers never assented, and in the existence of which they did not believe, then there was no partnership, unless, indeed, a co-partnership could be formed and conducted without their knowledge or consent. This would be simply absurd. We cannot in this way surprise them into a partnership of which they never dreamed.

Over twenty years ago John Phillips emigrated from Scotland and settled in Chicago with his family, consisting of a wife and four sons and two daughters. He was then very poor. He was a wood-turner by trade, and commenced that business in a very small way with a foot-lathe. He was frugal, industrious and honest, and prospered as but few men, even in this country, prosper. He labored hard with his own hands, and as his sons grew up they joined their work to his, all except John S., who, at a proper age was put as an apprentice to learn the chair-maker's trade, but his health proving delicate, his father made an arrangement with his master by which his time was released when he had but partially learned his trade, when John S. returned home and took a more or less active part in the business of his father. His health was, however, for many years, very delicate, and he was enabled to do but little physical labor. He, however, mostly took charge of the office and books, for which the testimony shows he was very well qualified, and where he rendered efficient service. In

the meantime, the business had grown from the smallest beginning, with a single foot-lathe, to a large manufactory, with extensive machinery propelled by steam; and chair-making, which was introduced at an early day, had become the principal or largest branch of the business. Thus this business was begun and continued and prospered, till 1860, when the complainant left his father and the business, and filed this bill for an account as among partners.

The business had always been conducted as it was begun, in the name of John Phillips, the father, although in a few instances bills were made out to John Phillips & Sons by persons with but a superficial acquaintance with them, which were paid without eliciting remark or particular attention. The books were all kept in the name of John Phillips, with the exception of a few entries made by a book-keeper in the name of John Phillips & Sons. Indeed, there is, and can be, no question that if there was a co-partnership embracing the father and sons, the firm name adopted was John Phillips.

The complainant, to show a co-partnership, proves that the sons all devoted their time and attention to the business after they attained their majority, without regular salaries as laborers or servants; that funds which they drew from the concern for their support were charged to each one separately, while neither ever received a credit for labor or services; that the father, upon one or two occasions, stated to third persons that his sons were interested in the business, and he also relies upon the appearances to the outside public, and the interest which all took in the success of the business.

For the defense, it is claimed, that, following the habits and customs of their forefathers in Scotland, the sons continued to serve the father in the same relation and with the same fidelity after attaining their majority as before, under the distinct and often declared understanding that all should belong to the father during his life, and at his death the business and

property should be left by him to his children, as he should think proper.

That this patriarchal system prevails to a much greater extent in Scotland than is familiar to us here is shown by the proof. This absolute control of the father over the property which is the fruit of the joint labor of the whole family, tends, undoubtedly, to accomplish one purpose, which was a cherished object with the father, and we may well believe was considered desirable by all, and that was, to keep the family together, and make all submissive and obedient to the father, as the head and owner, to whose discretion and will each must look for his proportion.

If such was the understanding and purpose of the parties, then there was no partnership. Originally, undoubtedly, the entire concern belonged to the father; and it so continued, unless by the agreement of the father the sons were admitted into the concern as partners; for, as before intimated, we know of no means by which the sons could become partners with the father, and thus acquire a title to his property, without his knowledge or consent. Did the father ever consent that his sons, or either of them, should be admitted as partners with him? Did he ever agree that they should be part owners of this property? On repeated occasions the subject of a co-partnership with his sons was presented to him, both in the presence of the complainant and his brothers, and he ever repudiated the suggestion in the most emphatic terms. The very suggestion, even, seemed to excite his indignation. Upon one occasion he expressed himself in this characteristic phrase: "Na, na! I will ha' nae sons for partners as long as I live. Damn them! they would put me out of the door." On none of these occasions do we find the complainant, or any of his brothers, claiming the existence of a co-partnership, but, on the contrary, they silently acquiesced in the assertions of the father.

But, to our minds, the controlling features of the evidence in this case consist in the testimony of the complainant himself, and his brothers. The testimony of Alexander A. C. Phillips, Kidzie and Peterson, shows that the complainant was repeatedly examined as a witness in cases between John Phillips and other parties, growing out of the business of the concern, and in all of these cases he swore that he was not a partner and had no interest in the concern. He then gave the same account of the relations between the father and sons which his brothers now give. Had there been a partnership he must have known it. If he had an interest in the business, he was then aware of it, and his denial of such partnership and interest must have been willfully false. There is no middle ground upon which he can stand in innocency, if there was a partnership. All his brothers, whom the complainant alleges in this bill were members of the firm, deny that there is, or ever has been, any co-partnership in this business, but that the father is the sole proprietor, and that none of the sons have any interest in the business other than an expectancy upon the death of the father. This expectancy is neither a legal nor an equitable interest, and yet it powerfully allies the expectants, in feeling, sympathy and effort, to the party or business from which they hope to realize their expectations. It often stimulates to long years of the most devoted service, as faithful and zealous as the most remunerative present reward.

That the complainant told the truth when thus examined, is testified to, as before stated, by all three of his brothers, in this cause, when they all stated that there was no such partnership as is alleged in the bill; that the entire business belonged solely to their father, in whose service they labored after they became of age the same as before, and that they had no interest in the business except what they might expect after his decease, and that entirely depended on his pleasure. They spoke what they must certainly have known. Had there ever

been any agreement, expressed or implied, that there should be a partnership, they, as parties to it, must have been aware of it. If not expressed in words, there must have been at least the mental intention and tacit understanding on the part of the father, that they should be admitted as partners, and on their part to assume the benefits and liabilities of partners, and this could not be without their knowledge. Others might be deceived by appearances. Others, ignorant of the customs and traditions of their forefathers, which are so fondly cherished by emigrants from the old country, and particularly from Scotland, might draw erroneous conclusions as to the true relation existing between them as a family, by seeing men in middle life zealously bending their energies under the guidance of their father to the promotion of the success of the business. Whoever should apply customs prevalent among native Americans to this state of facts would unhesitatingly conclude that all were in partnership. And so, no doubt, many were deceived, nor was it deemed necessary by any of the parties, on all occasions, to undeceive them by a full explanation of this family arrangement.

But the question here is, what was the actual fact, and not what observers supposed was the fact from appearances. It is the internal truth we are seeking, and these external appearances are only important as they may enable us to arrive at this truth; and when we so find the truth by indubitable proof in a different direction than that indicated by these external appearances, then these must go for naught. Here we have the positive testimony of every living man who has the absolute knowledge of the facts, including the complainant himself, all testifying most unqualifiedly that there was no partnership. And all these witnesses stand unimpeached, either directly or indirectly. True, in the appellee's argument, they are denounced in the most unmeasured terms. We, however, believe the witnesses, and we also believe that the complainant told the truth when he swore there was no

partnership, and believing this, the case is ended. If he did tell the truth, if his brothers have not committed corrupt perjury with him, then this decree was wrong, for there was no partnership. The law does not authorize us to discard this positive testimony unless we can show, from the record, sufficient reason for it. This we cannot do.

In the appellee's argument, filed *nunc pro tunc*, great complaint is made of the insufficiency and unfairness of the abstract, and had the appellee filed an amended abstract under the rule, setting forth fully the omitted portion of the record deemed important, it would have relieved us of much of the labor of this cause. The volume of testimony in the case is immense, to the great mass of which we cannot even allude in an opinion, but must content ourselves with stating our conclusions, barely alluding to some of the most vital of the proofs.

The decree is reversed and the bill dismissed.

Decree reversed.

At a term subsequent to that at which the foregoing opinion was filed, an application was made on behalf of the appellee for a re-hearing of this cause, which was denied, but the judgment previously entered in this court was so far modified as to allow the bill to be retained, in order that the complainant might present to the court the question whether the record showed such a state of facts as would entitle the complainant to compensation on the principle of a *quantum meruit*, and to an order of this court remanding the cause, with leave to amend the bill for that purpose. Finally, the complainant not availing himself of this privilege, the following additional opinion was filed:

PER CURIAM: This case was decided at the April term, 1863, and the decree of the court below reversed and the bill ordered

to stand dismissed. On a petition for a re-hearing, subsequently filed, the court was of opinion there was no sufficient grounds presented to justify the court in changing the judgment pronounced, but on our own suggestion, it was deemed proper to retain the bill, in order that the complainant therein, might present to the court the question, whether the record showed such a state of facts as would entitle the complainant to compensation on the principle of a *quantum meruit*, and to an order of this court remanding the case with leave to amend the bill for that purpose.

The complainant having failed to avail of this suggestion of the court, and we seeing no ground for a change of the opinion already pronounced, it is considered, that the decree of the court below be reversed and the bill dismissed.

CASES

IN THE

SUPREME COURT OF ILLINOIS.

SECOND GRAND DIVISION.

JANUARY TERM, 1869.

NOAH F. McNAUGHT

v.

WILLIAM R. DODSON.

MEASURE OF DAMAGES—*in action by vendor against vendee for refusing to receive the property sold.* Where a purchaser of personal property which was to be delivered at a specified place on a certain day and at a stipulated price, refuses to receive and pay for it, the price in the meantime having declined, in an action by the vendor against his vendee for refusing to comply with his contract, it seems the proper rule of damages is the difference between the contract price and the current price at the place of delivery.

APPEAL from the Circuit Court of McLean county; the Hon. JOHN M. SCOTT, Judge, presiding.

The opinion states the case.

Mr. L. Weldon and Messrs. Greene & Littler, for the appellant.

Messrs. Tipton, Benjamin & Rowell, for the appellee.

Mr. Chief Justice Breese delivered the opinion of the Court:

This was an action of assumpsit, brought to the McLean Circuit Court by William R. Dodson, against Noah F. McNaught, to recover damages for breach of a verbal contract made by plaintiff with defendant, to sell and deliver to him at Towanda, on a day named, 110 head of hogs, of a certain weight and description, at the price of $6.75 per 100 pounds.

The cause was tried by a jury, and a verdict rendered for the plaintiff for $300 damages. A motion for a new trial was overruled, and judgment entered on the verdict.

To reverse this judgment the defendant appeals to this court, and makes, as his principal point, the verdict was against the evidence.

Much evidence from many witnesses on both sides was given to the jury, which we have carefully examined, and are satisfied it fully sustains the verdict, and would have justified the jury in awarding heavier damages.

The plaintiff proved a full compliance with all the terms of the contract, both as to the number, quality, weight and place and time of delivering, and a sufficient tender of the least number bargained for by the defendant.

The plaintiff had at Towanda, on the day stipulated, a lot of 133 hogs, of the best quality, fully averaging up to the contract in every particular, from which lot he proffered to the defendant the selection of the number he had agreed to buy, but which he declined doing, and objected to any other person doing it.

There was some controversy about the price to be paid, defendant claiming that it was $6.50 per cwt., but the weight of the evidence most clearly is, it was $6.75, as alleged in the declaration. There was some controversy, also, as to a fact set up by defendant, of a transfer of the contract to other parties, his brother being one of them, but the evidence fails to establish it.

The evidence, however, does quite conclusively establish the fact, that live hogs were worth, on the day of the delivery of these at Towanda, but $5.25 per cwt. This may have operated with the defendant to decline the hogs at the price agreed. The morality of this, we leave out of the question—the legal right to do so, on that account, has no existence.

It further sufficiently appears in evidence, that the defendant, on the day, had no funds out of which he could have paid for the hogs. The plaintiff being ready to deliver and actually tendering the required number of hogs at the time and place agreed, is, upon every principle of law and justice, entitled to recover from one who makes default in performance on his part, such damages as he may show he has reasonably sustained.

Adopting, as a proper rule, the difference between the contract price and the current price at the place where delivered, the verdict would have been greater than the jury found, so that there can be no complaint on that score.

This was a case peculiarly for the consideration of the jury. Many witnesses were examined on both sides, on all points in controversy, and the jury found as we would have found, if sitting in their place. There is no ground, whatever, for the interference of this court. The evidence sustains the verdict, and no question of law is raised.

The judgment is affirmed.

Judgment affirmed.

Syllabus. Statement of the case. Opinion of the Court.

DANIEL ELLINGTON

v.

SAMUEL J. KING.

1. AGENCY—*extent of agent's authority.* K exchanged a horse for a mare belonging to E, through A, acting as E's agent. The mare proved unsound, whereupon K took her to A and requested him to return the horse. A replied that E had the horse, and that K must go to him. This K failed to do, and never at any time offered to E to return the mare, or demanded his horse, and afterwards brought replevin against E. Upon the trial, the court, in one of its instructions to the jury, *assumed* that the agency of A continued *after* the trade, so as to authorize him to rescind the contract: *Held*, that this was erroneous; that the mere fact that E authorized A to sell his mare did not empower him to rescind the contract at a subsequent time, and after E had received the horse.

2. SALES—*fraud—rescission of contract.* And in such case, if E obtained the horse by fraud, K would have the right to rescind the contract, but he could only do so by offering to return the mare and demanding his horse in return. *Buchanan* v. *Horney*, 12 Ill. 338.

WRIT OF ERROR to the Circuit Court of Clark county; the Hon. H. B. DECIUS, Judge, presiding.

This was an action of replevin, originally brought before a justice of the peace, by the defendant in error, Samuel J. King, against the plaintiff in error, Daniel Ellington, for the recovery of a horse. The plaintiff obtained a verdict and judgment before the justice, and the same result followed upon an appeal to the circuit court of Clark county. The further facts are fully stated in the opinion.

Mr. JOHN SCHOLFIELD, for the plaintiff in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

King exchanged his horse for a mare belonging to the plaintiff in error, Daniel Ellington, defendant in the court below.

The trade was made with Addison Ellington, acting as agent for his father, Daniel. The mare proving unsound, King, about two weeks after the trade, took her back to Addison, who was living with an uncle, a mile and a-half from his father, and requested him to take her and return the horse. Addison replied, his father had the horse, and plaintiff must go to him. This plaintiff did not do, and did not at any time offer to the defendant to return the mare or demand his horse. King brought replevin and obtained a verdict and judgment.

On the trial, the court gave the following instruction for the plaintiff:

"If the evidence shows the defendant, Ellington, recognized the agency of his son in making the trade, then a demand from the son, whose agency was recognized and continued by defendant, with power to deliver said horse, was all the demand necessary in order to authorize a recovery in replevin."

This instruction is seriously faulty, in assuming, as it does, that the agency of the son continued after the trade, so as to authorize him to rescind the contract. The mere fact that the father had authorized the son to sell the mare did not also authorize him to rescind the contract at a subsequent period, and after the father had received possession of the horse taken in exchange.

The court also erred in so qualifying the instructions asked by the defendant as to dispense with proof of a demand in case defendant had obtained the horse by fraud. If such was the fact, the plaintiff had the right to rescind the contract, but he could only do so by offering to return what he had received, and demanding what he had given. He could not retain the mare and at the same time recover the horse. *Buchanan* v. *Horney*, 12 Ill. 338.

The judgment is reversed and the cause remanded.

Judgment reversed.

WILLIAM S. RANKIN *et al.*

v.

JOSEPH TAYLOR *et al.*

1. CONTRACTS—*interpretation of—whether joint or several.* A, the owner of a farm, rented it to B & C, for one-third of the corn raised upon it, and directed B to sell his rent corn for 25 cents per bushel. Afterwards B & C offered to sell to D between 5,000 and 6,000 bushels of corn, and D agreed with B to take 4,650 bushels at 25 cents per bushel, and pay $126 in hand, and B agreed to furnish feed lots and troughs for feeding and watering 100 head of cattle. D failed to pay the whole of the sum down, which he had agreed to, and B & C refused to deliver any more corn. Afterwards, through his intercession, B & C delivered more of the corn to D, but the quantity so delivered does not appear. Differences arose between B & C and D, concerning the amount claimed to be owing from D, whereupon A told D to pay B & C the sum they claimed, and that he, A, would go with D and measure the ground, and make the difference, if any, right, and thereupon D paid B & C's claim. D failed to meet A for the purpose of measuring the ground, as agreed, when A measured it and found that it fell short 4½ acres of the estimate upon which D had paid B & C, and A, thereupon, offered to pay D the difference, which D refused, and brought suit on the original agreement between him and B & C, against all of the parties. *Held*, that A could not be considered as a party to, or liable upon the original contract made with B & C; the proof showing, that A's interest in the corn was separate and distinct, and that B & C's authority to act for A in the matter, *only* intended to be a sale of his interest at a specified price; that A could only be held liable for the failure of B & C to deliver so much of his corn as they had sold for him and failed to deliver; B & C being *alone* liable for their failure to deliver their portion of the corn, and which liability of A would be several, and not joint. That A's agreement with D, that he would make any difference right which might appear, if D would pay B & C, did not render A an original party to the contract, but simply amounted to a new agreement, upon which A alone was liable, and not jointly with B & C.

2. NEW TRIAL—*for improper instructions.* This court will not reverse a judgment simply because an erroneous instruction has been given, when it is apparent that it worked no injury to the party objecting to it.

APPEAL from the Circuit Court of Mason county; the Hon. CHARLES TURNER, Judge, presiding.

This was an action of assumpsit, brought in the court below by the appellants, William S. Rankin, J. Thomas Rankin and Jesse Taylor, against the appellees, Joseph Taylor, Benjamin W. Taylor and John J. Taylor, which resulted in a verdict and judgment for the defendants. To reverse this judgment, the record is brought to this court by appeal.

The facts in the case are fully stated in the opinion.

Messrs. LACEY & WALLACE, for the appellants.

Messrs. J. C. & C. L. CONKLING, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that Joseph Taylor was the owner of a farm in Mason county, and in 1866, rented it to Benjamin W. and John J. Taylor and others for the year, and was to receive one-third of the corn raised upon it as the rent. Afterward he removed to the State of Minnesota. In the autumn of that year, he directed Benjamin W. Taylor to sell his rent corn when he could receive 25 cents per bushel. Afterwards and during the fall, Benj W. and John J. Taylor offered to sell Jesse Taylor, one of the plaintiffs, between 5,000 and 6,000 bushels of corn at 25 cents per bushel. He agreed, on behalf of appellants, to take it at that price, and Benj. W. Taylor was to furnish feed lots and troughs for feeding and watering 100 head of cattle. The amount of corn was fixed at 4,650 bushels, and appellants were to pay Benj. W. and John J. Taylor, $125 in hand, but the time when the balance was to be paid does not definitely appear.

Appellants paid $60 in hand, and agreed to pay the balance in a few days, but failing to do so, Benj. and John Taylor refused to deliver any more corn; but through the persuasion of Joseph Taylor, they went on and delivered more, but as to how much corn there was delivered, the evidence is conflicting.

Differences existing between the parties, Joseph Taylor said to Jesse Taylor, who was acting on behalf of appellants, to pay John and Benjamin what they claimed, and he and Jesse would measure the ground, and if they had overpaid he would make it right. Thereupon appellants paid Benjamin and John their claim. Several times were fixed to measure the ground, but appellants failed to meet Joseph Taylor for the purpose, but he seems finally to have measured it, when it was found to fall short four and a-half acres of the estimate upon which appellants had paid Benj. and John J. Taylor. Joseph, thereupon, offered to pay appellants the difference between the sum they should have paid and what they had paid, but they refused to receive it, and brought suit on the original agreement, against all of appellees, including Joseph Taylor.

A careful examination of all the evidence in this record, fails to show that Joseph Taylor was a party to or liable on the original contract. He had only authorized Benjamin to sell his corn at a specified price. He did not authorize him to sell it with the corn of Benjamin and John J. Taylor, or to agree to furnish feed troughs. His interest was separate, being but one-third of the corn. He was not a partner, nor did he authorise Benjamin to contract jointly with him and John. We are unable to see upon what principle of justice he should be made liable for a failure of the other appellees to deliver their portion of the corn which they had failed to deliver, because his agent saw proper, without authority, to sell it with theirs. If he was in any manner liable on the sale, it would only be for a failure of his agent to deliver as much of his corn as his agent had sold and failed to deliver, and for which he had received payment. And this liability would only, in any event, be several and not joint. At or prior to the time the contract was entered into he had not guaranteed the amount of corn that should be delivered by the other appellees. So far as their two-thirds of the corn was concerned, they were alone liable for a failure in delivering it.

Nor did the agreement, that he would make any deficiency right, if appellants would pay Benjamin and John, render him an original party to the contract. That was a new and independent agreement, and if binding on Joseph it was as a guarantor for the return of any sum of money which appellants might overpay on the contract. And if liable, it would be individually, and not jointly with the other appellees; and as the suit was joint, a recovery could not be had against him in this suit.

Appellants complain of the 6th instruction given for appellees. They insist that it was wrong, because there was no consideration for the guaranty of Joseph Taylor, that he would make good any deficiency that might exist in the quantity of corn delivered. If this is true, still there is no evidence in the record from which it can be inferred that he ever jointly agreed, or authorized Benjamin to agree that he would be jointly bound, that Benjamin and John should deliver their portion of the corn under the contract. Under the evidence he could not be held liable for more than the deficiency in the amount of his portion of the corn. Thus it is manifest, that this instruction could not have misled the jury. We will not reverse a judgment simply because an erroneous instruction is given, where it is apparent that it could have worked no injury to the party objecting to it.

There was no error in refusing appellants' 12th, 13th and 14th instructions. They were opposed to the views here expressed, and were properly refused.

There being no error apparent in the record, the judgment of the court below must be affirmed.

Judgment affirmed

JAMES J. HAYCRAFT

v.

BENJAMIN F. DAVIS.

1. NEW TRIAL—*verdict against the evidence.* Where the only testimony to sustain the action was that of the plaintiff himself, who was flatly contradicted by the defendant, and two other witnesses who were disinterested, and who had full opportunity of knowing the facts to which they testified, and there was no impeachment of their integrity, and the jury found in favor of the plaintiff: *Held*, that such verdict was unwarranted, being manifestly against the weight of evidence, and should be set aside and a new trial awarded.

2. It is the province of the jury to weigh evidence, but they have no right to act from caprice, and render a verdict wholly against the evidence.

APPEAL from the Circuit Court of Jersey county; the Hon. CHARLES D. HODGES, Judge, presiding.

The opinion states the case.

Messrs. WARREN & POGUE, for the appellant.

Messrs. ROBINSON & KNAPP, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

This was an action of detinue for a promissory note made by James Brown, brought to the Jersey Circuit Court by Benjamin F. Davis, the payee, against James J. Haycraft, and tried by a jury on the general issue and several special pleas. The issues were found for the plaintiff, and the usual judgment was entered, that defendant deliver up the note or pay the plaintiff the value thereof, which was found by the jury to be $1,112.07, a motion for a new trial having been denied.

To reverse this judgment the defendant appeals to this court, making the point that the verdict was contrary to the law and

the evidence. The claim was, that the note had been pledged for a particular purpose, and that purpose accomplished by the payee, the pledgor.

The only testimony to sustain the action was that of the plaintiff himself, and he gave his understanding of the transaction. The point in controversy was, for what was this note left in pledge with the defendant? The plaintiff stated it was only to secure the defendant in his endorsement of plaintiff's note to one Vaughan, for $300. The defendant, and two disinterested witnesses, stated in the most unqualified manner, the defendant was to hold it as security, also for another debt of $93, which the plaintiff owed defendant on account of a quantity of whiskey received of defendant, belonging to one Marshall, and for which defendant was responsible to Marshall. The evidence on this point is clear and explicit. The defendant so testified, and so did Brown and Marshall. There can hardly be said to be any conflict of testimony on this point. It amounts to this, simply, that plaintiff swore Brown's note was pledged for the Vaughan note only, whilst these three witnesses, two of them wholly disinterested, swore it was to be held in pledge for this $93 for the whiskey. It was a flat contradiction of one witness by three others. The evidence so greatly preponderates in favor of the defendant, that we are at a loss to perceive why the jury found as they did, there not being the slightest imputation upon the credibility of those witnesses, and two of them wholly disinterested.

The case of *Wallace* v. *Wren*, 32 Ill. 146, cited by appellee, was a case of warranty of soundness of a horse, and the testimony was so conflicting upon the question, some witnesses testifying one way and some another, that it became a clear case for the jury to settle. Here it is a preponderance of evidence, not arising out of a conflict produced by witnesses on both sides, testifying in opposition, but where one interested witness swears one way, and three others, two of them entirely

disinterested, and upon a matter of contract, swear diametrically opposite.

The case of *Frizzell* v. *Cole*, 42 Ill. 362, was an action on the case for slander, where this court believed the court below had invaded the province of the jury by one of the instructions, and we said in that case, that it was the sole province of the jury to determine the weight that evidence should receive, and equally so to consider conflicting evidence without any assistance from the court. It may be, and is asserted as a general rule, the jury do occupy this position, and they must have reasonable latitude and freedom in deciding upon the evidence; but where a case is presented to an appellate court, in which an interested witness testified to one state of facts, and three others, two of them disinterested, stated the facts differently, and they had full opportunity of knowing the facts, and no impeachment of their integrity, their testimony should outweigh that of the single witness, and this court must say, the testimony so strongly preponderates in favor of the defendant as to compel a verdict in his favor. Juries have a right to weigh evidence, but they have no right to act from caprice, and render a verdict wholly against the evidence. If they were so permitted, the lives and property of the citizen would be at their mercy, and exposed to every lawless spoliator who might assail them.

Appellee's counsel are mistaken when they say the defendant did not testify positively to the main facts in the case. He did so testify, and so did Marshall and Brown.

The defendant testified, that plaintiff wanted to get something out of the mill, and as an inducement said to defendant, that he was already secured by Brown's note, which, according to his best recollection, the plaintiff said should be held as security for that accommodation also. This was quite a subordinate fact, and was not positively stated. The main fact was so stated, and in finding the verdict they did, the jury failed to give to the evidence that weight to which it was

entitled, and which effectually destroyed the testimony of the plaintiff, unsupported, to the same fact.

The verdict should have been set aside and a new trial awarded. The judgment is reversed and the cause remanded, that a new trial may be had.

Judgment reversed.

Ohio & Mississippi Railway Company

v.

James M. Kerr *et al.*

1. Sales—*personal property—fraudulently obtained by vendee—and pledged to another in good faith—rights of parties.* When a party sells goods to another, and delivers them, though under circumstances which would authorize him to rescind the sale as against the vendee, yet, if before its rescission, the purchaser pledges them to an innocent party, as security for an advance of money, such party will hold them, as against the first vendor.

2. Former decisions—*to the same effect. Jennings* v. *Gage*, 13 Ill. 610, and *Brundage* v. *Camp*, 21 ib. 330. The case of *Fawcett et al.* v. *Osborne et al.*, 32 ib. 425, and *Burton* v. *Curyea*, 40 ib. 321, cited and explained.

Appeal from the Circuit Court of St. Clair county; the Hon. Joseph Gillespie, Judge, presiding.

This was an action of replevin, instituted in the court below, by the appellees, James M. Kerr, George W. Howe and John H. Turner, against the appellant, the Ohio & Mississippi Railway Company, to recover a quantity of flour. The cause was tried before the court and a jury, and a verdict and judgment rendered for the plaintiffs; to reverse which judgment, the record is brought to this court by appeal. The facts in the case are fully stated in the opinion.

Mr. Gustavus Koerner, for the appellant.

Mr. Wm. H. Underwood, for the appellees.

Mr. Justice Lawrence delivered the opinion of the Court:

On the 30th of September, 1867, Kerr, Howe & Co., the appellees, sold to Lamb & Quinlin, in St. Louis, ninety-nine barrels of flour. There was no agreement for credit, and one of the appellees testifies the sale was made as a cash sale. In the afternoon of the next day the flour was delivered by the appellees to a transportation company, upon the order of Lamb & Quinlin, without payment, taken over the river, to the depot of the Ohio & Mississippi Railway Company, and consigned to New York. On the 2d of October the appellees demanded payment from Lamb & Quinlin, but were refused. The credit of the latter firm had been previously good, but on the 2d they failed, and subsequently went into bankruptcy. On the 3d of October, the appellees replevied the flour from the railway company, it not having yet been sent forward. On the first of October, however, Lamb & Quinlin negotiated their draft on New York, for $4,000, to the United States Savings Institution, and delivered the bill of lading as security. The bill of lading and draft were forwarded to New York, but the draft was not paid, nor was the flour received, as it had been replevied in this suit. The amount of the draft was placed to the credit of Lamb & Quinlin on the 1st, and checked out by them on the 2d. These facts are set up as a defense by the railway company, from whose custody the property was replevied.

This case falls fully within the principles laid down in *Jennings* v. *Gage*, 13 Ills. 610, and in *Brundage* v. *Camp*, 21 ib. 330, in the latter of which cases the authorities are fully reviewed. In the subsequent case, of *Fawcett et al.* v. *Osborn et al.*, 32 ib. 425, the distinction is pointed out between a sale

by a mere bailee, and a sale by a purchaser, to whom the possession of the property has been delivered, though under circumstances which might authorize the first vendor to rescind as against his immediate vendee. The same distinction is recognized in *Burton* v. *Curyea*, 40 Ill., 321. In the present case, if Lamb & Quinlin obtained possession of the flour, knowing that they would suspend payment the next day, and not expecting to pay for it when they gave the order for its delivery, it would, undoubtedly, be such a fraud as would enable the vendors to rescind the sale as against them. But before the sale was rescinded, Lamb & Quinlin had delivered the flour to the Savings Institution, as security for an advance of money, for the delivery of the bill of lading was the same thing as the delivery of the flour, as was said in *Burton* v. *Curyea*, *ubi supra*. It was a symbolical delivery —a delivery of the *indicia* of ownership—and as against the Savings Institution, the appellees had no right of rescission, or to a return of the flour. They had sold it and voluntarily delivered it, and thereby enabled Lamb & Quinlin to obtain credit, by pledging it to innocent parties.

It is not pretended that the Savings Institution had notice, or were apprised of any facts which should have put them on inquiry.

The instructions given to the jury, in behalf of the defendant, were in harmony with what we have here said, but the jury disregarded them; and as there is no dispute about the facts, the court should have set aside the verdict and granted a new trial. The jury may have been misled by the fourth instruction for the plaintiffs, to the effect that the bill of lading could only be transferred by the consignee. This instruction was erroneous.

The judgment is reversed and the cause remanded.

Judgment reversed.

Syllabus. Statement of the case.

THOMAS WEAVER

v.

JOHN CROCKER.

1. ERROR—*granting a new trial—cannot be assigned for error.* The rule is well settled, that an appellate court will never review the decision of the circuit court in granting a new trial. Whenever a new trial is granted, this court will not disturb it.

2. EVIDENCE—*written instruments—when contents of may be shown by parol evidence.* Where, upon a settlement made between parties, a paper was produced by one of them, purporting to contain a statement of the amounts of the accounts and the calculations in such settlement, and was shown to a third party then present, with the request that he should inspect it and see if the calculations had been properly made, which he did: *Held*, in a suit between the parties to such settlement, wherein an item contained in such paper was in dispute, that the party to whom such paper was shown might be permitted to testify as to his memory concerning the calculations of the amounts contained therein, without the production of such instrument; that it does not come within the rule in regard to proving the contents of written instruments.

3. NEW TRIAL—*finding against the evidence.* Where a cause is tried before the court, without a jury, and the evidence is conflicting, this court will not disturb the finding.

APPEAL from the Circuit Court of Macon county; the Hon. ARTHUR J. GALLAGHER, Judge, presiding.

This was an action of assumpsit, brought in the court below, by the appellant, Thomas Weaver, against the appellee, John Crocker, and which resulted in a verdict and judgment for the plaintiff for $462, to reverse which judgment the record is brought to this court by appeal. The facts in the case are fully stated in the opinion.

Messrs. MALONE & IRWIN, for the appellant.

Messrs. NELSON & ROBY, Mr. H. CREA and Messrs. GREENE & LITTLER, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that one Michael Weaver bought a half section of land from one Powers. By some arrangement $1,080 of the purchase money was to be paid to appellee, and a mortgage was given on the land to secure the payment of that sum. Weaver also executed a mortgage to Powers on the premises thus sold, to secure the payment of the balance of the purchase money to him. In 1868, Michael Weaver sold one-half of the land to appellant. By the terms of that sale appellant was to pay one-half of each of these mortgages, and of this there seems to be no dispute. It is contended that he was also to pay $640 for the choice of the two quarters.

Afterwards, the Powers mortgage was foreclosed, and appellee, being the junior mortgagee, redeemed from the sale. Michael Weaver afterwards, in 1864, sold his quarter to one Lone for $4,500, and appellee sold appellant's tract for $7,200, of which amount he received $2,200.

It seems that the contest in this case is over the $640 which appellant agreed to pay towards the purchase more than one-half, in consideration of his getting the choice of the quarters of land. The claim is based on an agreement that is claimed to have been made when Long paid for the tract he purchased of Weaver. Appellee swears that it was then agreed between himself, Michael Weaver and appellant, that appellant was to retain of that money, one-half of the money due him on his mortgage, with interest, and one-half he had paid to purchase the certificate of sale to Powers under his foreclosure, less the sum of $640, and was to retain what Michael Weaver owed him on the other account; that it was also agreed that the remaining one-half and the $640 should be paid to appellee by appellant; that this agreement was carried out, and he and

they settled on that basis. He also testifies, that in 1867, after Michael Weaver's death, he talked with appellant about this arrangement, and that he then said it was right; that in the spring of 1866, he, at the request of appellant, made a statement and sent it to the uncle of appellant, in Indiana, and the matter of the $640 was then spoken of by them.

Appellee's testimony is corroborated in its main features by the evidence of his son. But it is denied by appellant, who swears that he gave his note to his brother for $640 for the choice of the lands, and that he afterwards paid it in full. He swears that he never agreed to pay that sum to appellee, or ever recognized his claim to it, and swears he was not present at the time appellee says the agreement was entered into by the parties.

This seems to be the evidence relating to this transaction. There was, however, evidence of other transactions between the parties to the suit, in reference to grain furnished by appellee to appellant. On the evidence, the circuit judge, who tried the case without the intervention of a jury, by consent of the parties, found the issues for appellant, and assessed his damages at the sum of $462, and rendered judgment in his favor for that amount.

It is first insisted, for a reversal of the judgment, that the court below erred in granting a new trial at a former term of the court, and the affidavit upon which it was granted did not disclose sufficient grounds to warrant it. It is a well and long settled rule that an appellate court will never review the decision of the circuit court in granting a new trial. That is a matter resting altogether in the discretion of the court trying the cause, and when the new trial is granted this court will not interfere to disturb it. Under an act of our legislature, the common law has been changed so as to enable a party to assign error for refusing to grant a new trial, but the statute does not embrace the granting a new trial.

It is again urged that the court below erred in permitting the son of appellee to testify to the result of a settlement he says was made between his father and appellant. He swears that at that time appellant showed him a paper containing a statement of the amounts of the accounts and calculations in the settlement by the parties, and requested him to look over it and see if the calculations were properly made; that in this statement was the item of $640 in dispute, and that interest was computed at ten per cent., and that appellant said the statement and rate of interest were correct. A mere memorandum containing a quantity of figures and calculations is not a contract, agreement or writing which can only be proved by its production. It does not fall within the reason or rule of law requiring the production of documentary evidence. It was only a mere calculation of amounts, and as to them any witness might testify if he had seen and remembered them. This is the rule which is announced in the case of *The First National Bank of Decatur* v. *Priest*, decided at the present term. There was no error in permitting the witness to testify.

It seems, however, that the court below gave credit to the evidence of appellee, and was satisfied that appellee had not retained the $640. This was a conflict of evidence, and the court below, who saw the witnesses and heard them testify, had superior means to ourselves in determining what weight should be given to their evidence. In such cases we are not inclined to disturb the conclusion at which the circuit judge has arrived.

But appellee admitted, while testifying, that he had paid appellant all but $416 that he owed him; and it seems that the court below allowed appellant to recover that sum with interest, which is the amount of the judgment rendered in the case. And so far as the evidence discloses there was no error in computing the amount, of which appellant can complain.

If there was any error, it consisted in allowing more interest than was due, and if so, that did not prejudice appellant.

We perceive no error in this record, and the judgment of the court below must be affirmed.

Judgment affirmed.

JOHANNA FITZGERALD

v.

MATTHEW GLANCY, Administrator of the Estate of PATRICK MURRAY, Deceased.

1. ERROR—*writ of—will lie to county court to review proceedings granting an order to sell the real estate of decedents.* A writ of error will lie to the county court, to review the proceedings of that court in granting an order to sell the real estate of a deceased person, on application by the administrator. *Unknown Heirs of Langworthy* v. *Baker*, 23 Ill. 484.

2. EXECUTORS AND ADMINISTRATORS—*real estate of decedents—cannot be sold—except to pay existing debts.* An order to sell the real estate of a decedent will not be made except to pay debts due and owing at the death of the decedent. *Dorman et ux.* v. *Tost et al.*, 13 Ill. 127.

3. SAME—*order to sell real estate to pay debts contracted by the administrator—void.* And an order of the county court directing the sale of the real estate of a deceased person, to pay debts which were created by the administrator after the death of the intestate, is void.

4. SAME—*the expenses of unnecessary administration—not such a debt as would justify a sale of the land.* And where, at the time letters of administration are granted, there are no debts existing, and no question of distribution requiring the intervention of an administrator, the expense of administering, the result of unnecessary interference, cannot be regarded such a debt as would justify a proceeding to sell the land to pay it.

5. SAME—*administration—letters of—when may be issued after the lapse of seven years after the death of a decedent.* The lapse of seven years after the death of a decedent constitutes a bar to granting letters of administration, but which bar

may be removed by showing circumstances which prevented an earlier application for them.

WRIT OF ERROR to the County Court of Sangamon county; the Hon. WILLIAM PRESCOTT, Judge, presiding.

The opinion states the case.

Messrs. STUART, EDWARDS & BROWN, for the plaintiff in error.

Messrs. BRADLEY & OLDEN, for the defendant in error.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

This record presents a case wherein it is attempted to pervert the statute relating to the administration and settlement of estates of deceased persons, to purposes and objects not contemplated by the statute, and which cannot receive the sanction of this court.

The facts are simply these: The deceased, Patrick Murray, was a bachelor, and the owner of a lot of ground in the city of Springfield. He went to Texas, and died there, August 10th, 1860, intestate, leaving no personal estate and no debts, and no property besides this lot, which was then valued at $700. A sister of his,—and it would appear she was the only blood relation of the deceased,—had married Matthew Glancy, and died leaving four children.

On the 25th of September, 1867, this Matthew Glancy obtained letters of administration on the estate of his deceased brother-in-law, and on the 5th of October thereafter, filed an inventory of the estate, in which there was no personal property included, and no other property except this lot.

It becoming indispensable that some debts should appear against the estate, the administrator paid an attorney at law fifteen dollars for services rendered him as administrator, and

still further to manufacture demands against the estate, well knowing there were no debts against it, he published a notice in the newspaper, at the cost of five dollars and five cents, to creditors to present their claims, after having expended nine dollars and ninety-five cents for the fees and expenses attending the granting of the letters of administration. These several items, amounting to thirty dollars, were allowed by the county court. On November 30, 1867, the administrator, after notice to the heirs at law, presented his petition to the county court for an order to sell this lot to pay the debts he had thus created, alleging, in his petition, and which the inventory he filed on the 5th of October also alleged, that there was not at any time any personal property.

The application was resisted by the plaintiff in error, who was one of the heirs at law, but the court, after going through the farce of proving up these claims, granted the order.

To reverse this order, the record of the county court is brought here by Johanna Fitzgerald, one of the heirs at law, by writ of error.

The defendant in error objects, that a writ of error will not lie to the county court to bring in review before this court the propriety of its action in granting letters of administration. This is so, as this court said in *Hobson et al.* v. *Paine*, 40 Ill. 25, but this is not the purpose of this writ of error. Its purpose is, to bring before this court for review, the judgment of that court in granting the order of sale, and is governed by the case of *The Unknown Heirs of Langworthy* v. *Baker, Administrator*, 23 ib. 484. It was held in that case, that by the act of 1849, establishing county courts, such courts had concurrent jurisdiction with the circuit court in hearing and determining all applications for the sale of real estate of deceased persons for the payment of their debts, and therefore, as a writ of error would lie to the circuit court, the writ would lie directly to the county court in such cases, when an order of sale has been granted.

The objection to this proceeding is fundamental, and stands out in bold and startling relief, and if allowed, would subject the real estate of intestates dying free from debt, to the cupidity of unconscientious administrators, whose designs might be to appropriate it to themselves, to the injury of the heirs at law. The policy of our law most clearly is, that the real estate of decedents shall not be sold in this mode, except to pay debts due and owing at the death of the decedent. It would not matter if he left no personal estate—leaving debts which could only be paid by converting his realty into personalty for such purpose, would be ample justification to the county court, no doubt, for granting letters of administration, and passing an order of sale, the proceedings for such purpose being otherwise conducted according to the statute.

This is the first case, within our knowledge, where debts have been created by an administrator after the death of his intestate, and allowed by a court as claims against his estate, and an order granted to sell his lands to pay them. They were not such claims, and cannot, by any legal alchemy, be made such, and not being such, the order to sell this lot to pay them, was erroneous and void. It has no legal basis to rest upon, and none whatever for the application in the first instance. *Dorman et ux.* v. *Tost et al.*, 13 Ill. 127.

This lot descended to the heirs at law of Murray, affected only by such debts as existed against him at the time of his death. The very purpose of the application, as we regard the statute, is to obtain a fund by the sale of real estate, there being no personal estate, to pay debts so existing, and an administrator, by no law of which we are cognizant, can contract debts against the estate he represents, and to pay them, obtain an order to sell the land.

We concur fully with the Supreme Court of Pennsylvania in *Walworth* v. *Abel*, 52 Penn. 370, and with the Supreme Court of Missouri in *Farrar* v. *Dean*, 24 Mo. 16, that where there are no debts at the time letters of administration are

granted, and no question of distribution requiring the intervention of an administrator, the expense of administering, the result of unnecessary interference, cannot be regarded such a debt as would justify a proceeding to sell the lands. Such costs and expenses are not due by the deceased, and only arise from the officious and unnecessary intermeddling of the administrator.

Another objection is made by plaintiff in error, that the application for letters of administration was not made until after the lapse of seven years from the death of the decedent, and reference is made to the case of *McCoy* v. *Morrow*, 18 Ill. 519.

That case intimates, that the duration of a creditor's lien upon the real estate should be limited to seven years from and after the death of the intestate, in analogy to the lien of judgments. Circumstances might occur to prevent the issuing of letters until after the lapse of seven years from the death, the knowledge of such death not being brought home to the next of kin or to parties interested. It might be, in this case, as Murray died in Texas, in August, 1860, and such terrible events ensued immediately thereafter, that the fact was not known until the termination of hostilities. It might be safe to say that seven years shall be a bar to granting letters of administration, which bar might be removed by showing circumstances which may have prevented an earlier application for letters.

In this record we discover a most glaring disregard of the requirements of the statute. We see a case demanding the severest animadversions of this court. It has no law, justice, equity or shadow of right in any part of it to commend it to favorable consideration.

The judgment of the county court, ordering the sale of this lot, is reversed, at the costs of the applicant, to be taxed against him individually.

Judgment reversed.

Syllabus.

PETER RINGHOUSE

v.

MARIA KEEVER.

1. DEATH—*what sufficient proof of the death of a party.* The ordinary rule is, that it is general reputation among the kindred only of a deceased person, that is admissible in proof of death, but this rule has been relaxed in cases where the deceased left no kindred that are known, and in such cases, reputation among the acquaintances of the deceased is sufficient proof of the fact.

2. JOINDER OF COUNTS—*in ejectment.*—The 9th section of our Statute of Ejectment seems, by implication, to forbid the joinder of a count for dower with counts of a different character.

3. SAME—*remedy for dower.* At any rate, where the plaintiff, as the widow, claims one-half the premises in fee, as heir of her deceased husband, and joins a count for dower in the other half, the latter count should, upon motion by the defendant, be stricken out.

4. In such a case, the action of ejectment does not furnish an appropriate remedy for the recovery of dower, but it should be asserted in chancery.

5. DOWER—*when the right exists.* Where a party dies intestate, leaving no lineal descendants, his widow will take one-half his lands in fee, as his heir, and dower in the other half. The case of *Lessley* v. *Lessley*, 44 Ill. 527, applied only to testate estates, and does not affect the rule as to dower, as here asserted.

6. SAME—*extent of the right.* But where the widow claims one-half the land in fee, as heir, her dower interest attaches only to the remaining half which descends to the other heirs; she cannot take one-half in fee and a dower right in so much of the other half as would be equal to one-third of the whole.

APPEAL from the Circuit Court of Mason county; the Hon. CHARLES TURNER, Judge, presiding.

The opinion states the case.

Messrs. LACEY & WALLACE, for the appellant.

Mr. B. S. PRETTYMAN, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action in ejectment, brought by Maria Keever, claiming as widow and heir of her former husband, Henry Hardie. It is objected, that the proof of the death was not sufficient. The ordinary rule is, that it is general reputation among the kindred only of a deceased person, that is admissible in proof of death, but that rule has been sometimes relaxed, as in *Scott's lessee* v. *Ratcliff*, 5 Pet. 81. Where, as in the present case, the deceased left no kindred that are known, the rule must be relaxed from necessity.

In this case, the depositions of two witnesses were taken, who lived in New Orleans, and who were present at the marriage of Hardie in that city, in 1845. They testify that he had but one child, who died, and that he, also, died of cholera in 1849. His death was announced in the newspapers, and he was spoken of by his acquaintances as dead. His widow subsequently married her present husband.

The instruction given for the plaintiff is not sufficiently qualified as a rule of universal application, but in this case it worked no prejudice, as the evidence was competent and sufficient. In a population as unstable as ours, and comprising so many persons whose kindred are in distant lands, the refusal of all evidence of reputation in regard to death, unless the reputation came from family relatives, would sometimes render the proof of death impossible, though there might exist no doubt of the fact, and thus defeat the ends of justice.

In the case before us, the plaintiff, in one count, claimed the fee simple to an undivided half of the premises, and in another an undivided third of an undivided half as dower.

The defendant moved to strike from the declaration the last count, which motion the court overruled, and on trial gave judgment for the plaintiff upon both counts—upon the first, for the recovery of an undivided half, and upon the second,

that commissioners be appointed to assign her dower in the entire premises, which commissioners the court proceeded to appoint. The 9th section of our Statute of Ejectment seems, by implication, to forbid the joinder of a count for dower with counts of a different character. Without deciding that question, however, it is enough to say, in the present case, that the plaintiff was not entitled to an assignment of dower in the entire premises, as the court awarded, but only to an assignment of one-third of an undivided half, which was all that was claimed in the second count.

The case of *Lessley* v. *Lessley*, 44 Ill. 527, applied only to testate estates, and was not intended to overrule the previous decisions, holding that in cases of intestacy, the widow is entitled to one-half the realty in fee, and dower in the other half, where there are no lineal descendants. But we are not aware it has ever been contended, that even in such cases, the widow is to take the fee to one-half and a life-estate in so much of the other half as would be equal to one-third of the whole. If she takes one-half as heir, she must contribute equally with the other heirs to the satisfaction of the dower. Her dower interest in her own half is merged in the fee, and the reservation of the dower right provided for in the 46th section of the Statute of Wills, is merely of her dower interest in that portion of the estate which she does not take by a higher title, to-wit, in the present case, one-third for life in that half which descends to the other heirs. The judgment, therefore, upon the second count, was erroneous.

Nor do we perceive how any judgment for dower which can be executed, can be rendered in the present case. The recovery would be of an undivided third of an undivided half, and commissioners would be appointed, under the 45th section of the Statute of Ejectment, to assign the dower by metes and bounds. But before they could do this, it would be necessary that the undivided halves should be partitioned between the widow and the other heirs, and such partition these

commissioners would have no power to make. Where the widow claims one undivided half in fee, and dower in the other undivided half, the action of ejectment does not furnish an appropriate remedy. Her right of dower should, in such cases, be asserted by bill in chancery.

The count for dower should have been stricken from the declaration.

The judgment is reversed and the cause remanded.

Judgment reversed.

EMANUEL MORTIMER *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS, for the use of ADA WELLS.

1. GUARDIAN AND WARD—*guardian alone responsible for the application of his ward's money.* In an action of debt against M, upon his bond as guardian, it appeared in proof, that M made a settlement of his guardian's account with the probate court, and that upon such settlement, M, by order of the court, executed to A, who was appointed his successor, a note for the amount found to be owing by him, and was thereupon discharged; that M afterward paid A a portion of said note in money, and at A's request made a payment for lumber to the extent of the balance of the note, and which lumber A used in improving the real estate of the wards. On the trial, the court below refused to allow M credit for the money paid for the lumber. *Held*, that this was erroneous; that the payment for the lumber amounted to the same as a payment in money, and should have been allowed as a credit.

2. A guardian may receive his ward's money, and when received, he is responsible for its application. If he misapplies it, no new liability is created against the parties from whom it was received, as it is no part of their duty to see that the guardian faithfully applies it.

APPEAL from the Circuit Court of Coles county; the Hon. JAMES STEELE, Judge, presiding.

The opinion states the case.

Mr. O. B. FICKLIN, Mr. JOHN SCHOLFIELD, and Messrs. WILEY & PARKER, for the appellants.

Mr. JAMES A. CONNELLY, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of debt on a guardian's bond, brought by appellees in the Coles Circuit Court, against appellants. It appears that the former husband of Ada Wells, the beneficial plaintiff below, who resided in Cincinnati, Ohio, died, and by his will appointed her guardian of his three minor children; that she afterwards married appellant Mortimer, and they removed to Coles county, in this State. After arriving there, Mortimer was appointed guardian of the children by the probate court. He purchased, with their money, 160 acres of land for, and conveyed it to, them. He was afterwards, on the application of one of his securities on his guardian's bonds, cited to appear before the probate court for settlement of his guardian's account.

At the June term, 1864, of that court, he attended and made a settlement, and was found to have of their money the sum of $476.90, when he was ordered by the court to execute a note for that sum to Ada Wells, as testamentary guardian, which he did. He afterwards paid to her, on the note, $160 or $170, as he swears, or, as she testifies, $150. He also paid for lumber used by her in erecting a house on the land he had purchased for the minors, the sum of $349.55, and as he testified, under the direction of the guardian. The court below, who tried the case, without a jury, by consent, on the

evidence in the case, rendered a judgment against appellants for $210 and costs; to reverse which, they bring the case to this court by appeal.

There seems to be no doubt that Mortimer has, either in money paid directly to the guardian or with money paid for lumber used in erecting the house of the wards, fully paid and discharged the note and interest, provided the payment for the lumber can be applied as a credit. As to the money paid by him directly to the guardian, there is and can be no question, as she was fully authorized to receive it. Again, the lumber was used by her in the improvements placed upon the land of the wards, and they have received and are now enjoying its benefits; and equity, morals, and good conscience require that Mortimer should have his money thus paid refunded to him, and it is no more than the plainest and most common principles of justice, that those holding and enjoying such benefits, should pay for them, unless prohibited by some stern rule of law.

It is true, that they are under legal disability, and are incapable of making a contract that would bind them for improvements made upon their real estate, notwithstanding it may be the house that shelters them from the inclemencies of the weather. But the guardian whom the law has appointed to act for them, may receive their money, and when received, is responsible for its application. Any misapplication of their money by the guardian, does not create a new liability on the part of the persons from whom the money was collected. It is no part of their duty to see that it is faithfully applied. And when the guardian received this lumber from Mortimer, and applied it to the construction of the house on the land of her wards, it was precisely, in principle, the same as if he had paid the money to her and she had used it in the purchase of the same lumber. And had he paid the money and it had been thus applied, there could have been no pretense that Mortimer and his securities were liable for its misapplication.

And in this case, the purchase of the lumber by Mortimer, at the request of the testamentary guardian, is equally as binding on her as if he had paid the money to her and she had then purchased the lumber, and it operated as a discharge and satisfaction of his note.

The court below erred in not allowing the credit for the money thus paid for the lumber, and the judgment must be reversed and the cause remanded.

Judgment reversed.

CITY OF SPRINGFIELD

v.

HENRY LE CLAIRE.

1. MUNICIPAL CORPORATIONS—*liability of—for safe condition of streets.* Where the duty is imposed by law upon a municipal corporation, to keep its streets in a safe condition for use by the public, an action on the case will lie against it for damages arising from a neglect of such duty.

2. SAME—*primary liability of.* And in such case, the duty being imposed upon the corporation, it cannot be shifted to a person who had been employed to perform it, and if an injury results from neglect of such duty, the corporation must be held liable for the damage.

3. FORMER DECISIONS. *Lesher et al.* v. *The Wabash Navigation Co.*, 14 Ill. 85; *Hinde* v. *Same*, 15 ib. 72; *Chicago, St. P. & Fond du Lac R. R. Co.* v. *McCarthy*, 20 ib. 385; *Browning* v. *City of Springfield*, 17 ib. 143; *Scammon* v. *City of Chicago*, 25 ib. 424, and *City of Bloomington* v. *Bay*, 42 ib. 503, cited in support of this doctrine.

4. CORPORATIONS—*duty of—in exercising their powers.* Corporations, like individuals, are required to execute their rights and powers with such precautions as shall not subject others to injury.

5. MUNICIPAL CORPORATIONS—*negligence of—what defenses not allowed.* In an action against a municipal corporation, for injuries alleged to have been sustained by the plaintiff from falling into a sewer, which, under a contract with the

Syllabus. Statement of the case.

corporation was in process of construction, in one of the public streets, the defendant filed two special pleas, by the first of which, liability was sought to be thrown on the contractor who was engaged in the work, and the second plea was based upon a clause in the charter of the city, to the effect that it should not be held liable for any damages arising from the bad condition of its streets, from neglect to *repair* the same, until a certain officer should have been notified thereof, and failed to repair the same within a reasonable time after such notice. A demurrer was sustained to these pleas, and judgment rendered thereon. *Held*, that this action of the court was proper—neither of the pleas presenting any defense to the action; that this provision in the charter had no application to the case stated in the declaration. The injury complained of was not the result of *defective* streets, but in permitting the sewer to be constructed in a manner dangerous to the public safety.

APPEAL from the Circuit Court of Sangamon county; the Hon. EDWARD Y. RICE, Judge, residing.

This was an action on the case, brought in the court below, by the appellee, against the appellant, to recover damages for injuries alleged to have been sustained by him from falling into a sewer which was being made in one of the streets of the city. The defendant pleaded the general issue, and two special pleas. Joinder was had on the plea of the general issue, and a general demurrer was filed to the special pleas, which the court sustained, and rendered judgment thereon. A trial was had thereupon, before the court and a jury, and a verdict and judgment rendered for the plaintiff for $2,000, to reverse which the record is brought to this court by appeal, the appellant assigning for error, the action of the court below in rendering judgment on the demurrer to the special pleas.

Messrs. MCCLERNAND & BROADWELL and Mr. T. G. PRICKETT, for the appellant.

Messrs. PALMER & HAY, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

The questions presented by this record arise out of the ruling of the circuit court on the special pleas of the defendant, appellant here. There are two of these, by the first of which, responsibility is sought to be thrown on the contractor who made the sewer.

That the city may not be liable, within the meaning of the rule *respondeat superior*, for the acts of its contractors or their workmen while engaged in effecting a lawful object, is not the question here. The question is, was there a duty resting upon the city, growing out of the franchises conferred upon it, to keep its public streets in a safe condition for the passage of travelers and others having occasion to use them. That there was, is established by the charter bestowing the franchises, the sixth clause of the fifth article of which gives to the city exclusive control and power over its streets, alleys and highways, and to put drains or sewers therein; and by the seventh clause of the same article, full power is given it to construct, regulate and keep in repair bridges, culverts and sewers, sidewalks and cross-ways, and to regulate the construction and use of the same.

It is a necessary corollary, from these premises, that a party receiving damage from neglect of this duty, is entitled to his action. *Clayburgh* v. *The City of Chicago*, 25 Ill. 535. As the city is the principal in the duty imposed, it must occupy the same position when damages are claimed for a neglect of that duty. Neither the one nor the other can be shuffled off the city by their act. Admitting that the power to construct sewers is discretionary as to the time of its exercise, yet, when exercised, it must be in such a manner as not to expose others to injury. A corporation, like individuals, is required to exercise its rights and powers, and with such precautions, as shall not subject others to injury.

But it is quite unnecessary to argue the question presented by this plea, as the matters contained in it have so often been held by this court to constitute no defense. *Lesher et al.* v.

The Wabash Navigation Co., 14 Ill. 85; *Hinde* v. *Same*, 15 ib. 72; *Chicago, St. P. & Fond du Lac R. R. Co.* v. *McCarthy*, 20 ib. 385; *Browning* v. *City of Springfield*, 17 ib. 143; *Scammon* v. *City of Chicago*, 25 ib. 424; *City of Bloomington* v. *Bay*, 42 ib. 503, and Ang. & Ames on Cor., sec. 10.

Decisions to the same effect are found in *Story* v. *City of Utica*, 17 N. Y. 104; *City of Buffalo* v. *Holloway*, 3 Seld. (N. Y.) 493, and *Robbins* v. *City of Chicago*, 2 Black, (U. S.) 418.

The only case conflicting with those cited by appellant, is *Painter* v. *The City of Pittsburgh*, 46 Penn. 221, the doctrine of which we are forbidden, by prior decisions of this court cited on the same question, to follow or sanction, even if approved. The construction of the sewer by contract, did not release the city from the obligation, while in process of construction, to have it so carried on as not to endanger the lives or limbs of travelers upon the street. It could have required this of the contractors, and it was negligence to omit it.

The third plea brings up this clause in the charter of the city:

"That the city of Springfield shall not be liable for any damages or injury arising from the bad condition of the streets, alleys or highways of the city, by reason of the neglect of the proper officer of said city to repair the same, until the supervisor of said city shall have been notified thereof, and shall have failed to repair the same within a reasonable time after such notice."

Laying out of view all consideration of the propriety of such a clause, and its inconsistency with other provisions of the charter, and with established rules of law, it is very manifest it cannot apply to this case. There is no charge in this declaration of negligence in not keeping the street in repair, but for permitting a work to be carried on in a street,

dangerous in itself, without proper safeguards, and which they neglected to supply. The injury complained of was not the result of a defective street, which a traveler upon it might have noticed and reported, but for permitting the sewer in it to be excavated in a manner hazardous to the safety of the people.

The pleas being bad, neither of them presenting any defense to the action, judgment for the plaintiff on the demurrer, was the proper judgment, and no evidence of the facts contained in them was admissible.

There being no error in the record, the judgment must be affirmed.

Judgment affirmed.

TOLEDO, WABASH AND WESTERN RAILWAY COMPANY

v.

WILLIAM APPERSON.

1. NEGLIGENCE—*liability of railroad company—for injuries to passengers.* In an action against a railroad company, for injuries received by the plaintiff, from the upsetting of one of defendant's cars, when traveling upon its road, where the proof showed that the track where the accident occurred was in a wretched condition, the rails being badly worn and insecurely fastened, of various lengths, loose at the ends, and with spaces between the joints, which were filled with wooden plugs, and that some of the ties were broken in the middle: *Held*, that this was such gross and wanton negligence on the part of the company as to render it liable for the injury resulting therefrom.

2. RAILROAD COMPANIES—*required to know the condition of their roads.* Railroad companies are bound to keep themselves informed as to the condition of their tracks, and to know whether they are in a fit condition for the safe passage of their trains or not.

Appeal from the Circuit Court of Champaign county; the Hon. A. J. Gallagher, Judge, presiding.

The opinion states the case.

Mr. A. E. Harmon, for the appellant.

Messrs. Coler & Smith, for the appellee.

Mr. Justice Lawrence delivered the opinion of the Court:

This was an action brought by the appellee, against the appellant, for injuries received by the former when traveling upon the defendant's line. The car in which the plaintiff was seated ran off the track and was overturned, causing him very serious injury, for which the jury gave him a verdict of $1,000, and the court rendered judgment on the verdict.

The verdict and judgment were unquestionably correct. The evidence shows the railway track, where the rail was broken and the accident occurred, to have been in such wretched condition as to make the company fairly chargeable with gross negligence. A part of the rails were fastened with spikes instead of chairs. Some of them were badly worn, having their ends so loose that they worked up and down with each passing car; some of the ties were broken in the middle, and the rails varied in length from nine to thirteen feet, some of them not meeting at the joints by two or two and a-half inches, the spaces being filled in with wooden plugs, and the rails only partially spiked. This was trifling with the lives of travelers, to an extent that admits of no excuse or palliation, and suggests the question whether a remedy should not be given to the public on the criminal side of the court.

The objections taken to the judgment, viewed in connection with the entire record, relate to matters wholly immaterial. It was, for example, immaterial how far the employee, called

the "section boss," was to be considered the agent of the company, or whether or not he was notified of the condition of the track. It is the duty and business of a railway company to keep itself informed of the condition of its track, and when it invites the public to travel upon its lines, it must be held to know whether they are in a fit condition for the safe passage of cars or not.

The instructions properly submitted the case to the jury, and the verdict is fully sustained by the evidence.

The judgment must be affirmed.

Judgment affirmed.

The Farmers and Merchants' Insurance Company

v.

Robert Buckles, Jr.

1. Jurisdiction—*circuit courts—jurisdiction of presumed—until rebutted.* The circuit courts are courts of general jurisdiction, and the presumption is in favor of their jurisdiction to hear and adjudicate all cases, until such presumption is rebutted.

2. Same—*the proper mode of questioning jurisdiction of the person of defendant is by plea in abatement.* Where a defendant sued in a foreign county, entered a motion to dismiss the suit for want of jurisdiction, which was allowed, upon its being shown that the summons was served on the defendant in a foreign county, and the admission by the plaintiff that defendant was a resident of such foreign county at the time of the commencement of the suit: *Held*, that this action of the court was erroneous; that before the defendant could be entitled to such judgment, he should have shown, under a plea in abatement, either that the plaintiff did not reside in the county where the suit was brought, or that the contract was not actually made in that county.

3. Same—*by motion—practice irregular.* In such cases, the practice would not be regular, even if it could be done, to raise this question on mere motion; but where either of these facts has been shown under a plea in abatement, the presumption of jurisdiction is rebutted.

Appeal from the Circuit Court of Adams county; the Hon. Joseph Sibley, Judge, presiding.

The opinion states the case.

Messrs. Skinner & Marsh, for the appellant.

Mr. Justice Walker delivered the opinion of the Court:

This was an action of assumpsit, brought by appellant, in the Adams Circuit Court, against appellee. The declaration only contained the common counts. A summons was issued to the sheriff of Logan county, and served upon appellee in that county. At the return term appellee entered a motion to dismiss the suit for want of jurisdiction. On the hearing of the motion the return of the sheriff was read to prove that the summons was served in Logan county, and appellant admitted that appellee resided in that county at the commencement of the suit, and on this evidence the court below quashed the summons, dismissed the suit, and rendered judgment against plaintiff for the costs. The company have brought the record to this court, and assign the decision of the court in quashing the summons and dismissing the suit, for error.

The circuit courts having general jurisdiction, the law presumes jurisdiction to hear and adjudicate all causes until the presumption is rebutted. The act of 1861, (Sess. Laws, p. 180,) declares that it shall not be lawful for a plaintiff to sue a defendant out of the county in which the latter resides or may be found, except in personal actions, where there are more than one defendant, when the plaintiff may sue in the county in which either of them resides, and may have writs to any county for the other defendants. Had this been all of the legislation on the subject, it is manifest that the decision of the court below would have been correct. But the third section of the same act declares that the provisions of the act

shall not apply to any case where the plaintiff is a resident of, and the contract upon which suit is brought shall have been actually made in, the county in which it is brought.

Inasmuch as the presumption is in favor of the jurisdiction of the court, the defendant should have shown, by plea in abatement, either that the plaintiff did not reside in Adams county, or that the contract was not actually made in that county. Had either of these questions been presented by plea in abatement, and sustained by the evidence, then the defendant would have been entitled to the judgment which was rendered. Had either been shown under a plea in abatement, then the presumption of jurisdiction would have been rebutted. This is the uniform construction given to the original as well as the amendatory act of 1861. Even if the question could be raised on a mere motion, which would not be regular practice, the evidence in this case does not show that the plaintiff did not reside in Adams county, or that the contract was not actually made in that county, and hence there was no ground for rendering the judgment.

Inasmuch as the judgment of the court below is erroneous, it must be reversed and the cause remanded.

Judgment reversed.

DANIEL GILLHAM

v.

THE MADISON COUNTY RAILROAD COMPANY.

SURFACE WATERS—*rights of the servient and dominant heritage.* The owner of a servient heritage has no right, by embankments or other artificial means, to stop the natural flow of the surface water from the dominant heritage, and thus throw it back upon the latter.

WRIT OF ERROR to the Circuit Court of Madison county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

The opinion states the case.

Messrs. BILLINGS & WISE, for the plaintiff in error.

Messrs. DALE & BURNETT, for the defendants in error.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

The question presented by this record is, has the owner of a servient heritage a right, by embankments or other artificial means, to stop the natural flow of the surface water from the dominant heritage, and thus throw it back upon the latter?

The case was this: Plaintiff in error was the owner of a tract of land less elevated than the land in the neighborhood, from which all the water that fell upon it from rains or otherwise, flowed on to the land of the plaintiff, and which, by means of a depression in his land, ran off his land to adjoining land, and thence into a natural lake.

The defendant, a railroad company, made a large embankment on the line of plaintiff's land, entirely filling up this channel, thereby throwing the water back on plaintiff's land. Negligence in so doing, without leaving an opening in the embankment for the water to flow on and escape, was alleged in the declaration. A demurrer was sustained to the declaration.

This is a very interesting question, demanding more time for its thorough examination than we have at our disposal.

We have looked into the authorities cited on both sides, and find, in Massachusetts, the courts of that State recognize the right of the servient heritage to obstruct the natural flow of surface water, acccording no right of action in behalf of a person

injured thereby. *Gannon* v. *Hargadon*, 10 Allen, 109; *Dickson* v. *Worcester*, 7 ib. 19; *Inhabitants of Franklin* v. *Fish*, 13 ib. 212; *Parker* v. *Newburyport*, 10 Gray, 28; *Flagg* v. *Worcester*, 13 ib. 601. The doctrine of these cases wholly ignores that most favored and valuable maxim of the law, *sic utere tuo, ut alienum non lædas*, a maxim lying at the very foundation of good morals, and so preservative of the peace of society.

In *Kauffman* v. *Griesemer*, 26 Penn., the doctrine was recognized, that the superior owner might improve his lands by throwing increased waters upon his inferior through the natural and customary channels, and in *Martin* v. *Riddle*, ib. 415, it was held, where two fields adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one, and the owner of the lower ground has no right to erect embankments whereby the natural flow of the water from the upper ground shall be stopped; nor has the owner of the upper ground a right to make any excavations or drains by which the flow of the water is directed from its natural channel, and a new channel made on the lower ground, nor can he collect into one channel waters usually flowing off into his neighbor's field by several channels, and thus increase the wash upon the lower fields. *Miller* v. *Laubach*, 47 ib. 154, is to the same effect.

This is the doctrine of the civil law, and has found favor in almost all the common law courts of this country and of England. *Acton* v. *Blondell et al.* 12 Mees. & Wels. 324; *Mason* v. *Hill*, 5 B & Ad. 1; *Bellows* v. *Sackett*, 15 Barb. 96; *Laumier* v. *Francis*, 23 Mo. 181; *Earl* v. *DeHart*, 1 Beasley, 280; *Laney* v. *Jasper*, 39 Ill. 46; *Livingston* v. *McDonald*, 21 Iowa, 160. Other cases might be cited, but we will content ourselves, for the present, with citing some comments of Professor Washburne, in his able Treatise on the Law of Easements and Servitudes, on the case of *Martin* v. *Riddle*, *supra*:

In *Martin* v. *Riddle*, the plaintiff was the dominant proprietor, as is the plaintiff in error here, and in his comments on the case he says: "The owner of the upper field has a natural easement, as it is called, to have the water that falls upon his own land flow off the same upon the field below, which is charged with a corresponding servitude, in the nature of dominant and servient tenements." p. 355. To the same effect is 3 Kent's Com. 563.

The case of *Livingston* v. *McDonald*, *supra*, was a case of drainage, where it was held, if the ditch increased the quantity of water upon the plaintiff's land, to his injury, or without increasing the quantity, threw it upon the plaintiff's land in a different manner from what the same would have naturally flowed upon it, to his injury, the defendant was liable for the damage thus occasioned, even though the ditch was constructed by the defendant in the course of the ordinary use and improvement of his farm.

By the same reasoning, the reverse of the proposition must be true, that a person cannot, by an embankment or other artificial means, obstruct the water in its natural flow, and thus throw it back upon the upper proprietor. *Nevins* v. *City of Peoria*, 41 Ill. 502; *Rudd* v. *Williams*, 43 ib. 385.

The declaration stated a good cause of action, and the demurrer should have been overruled.

For the error in sustaining it, the judgment is reversed and the cause remanded.

Judgment reversed.

OLIVER C. KELSEY

v.

WILLIAM HENRY.

1. DAMAGES—*what will not be considered excessive.* In an action of trespass, where the proofs showed an assault of an outrageous character made upon the plaintiff, and without provocation, a verdict for $600 cannot be considered unreasonable, the court having properly instructed the jury, that they could find exemplary damages, if they believed the evidence showed an aggravated assault.

2. NEW TRIAL—*improper evidence.* And in such case, the judgment will not be reversed because the court below admitted improper evidence, when, from the entire record, it is apparent that its admission had no influence on the verdict of the jury.

APPEAL from the Circuit Court of Morgan county; the Hon. CHARLES D. HODGES, Judge, presiding.

The opinion states the case sufficiently.

Messrs. KETCHAM & ATKINS, for the appellant.

Mr. H. CASE, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of trespass, for a very outrageous and wholly unprovoked assault by a landlord upon one of his guests. The jury gave a verdict for $600, which cannot be considered unreasonable, the court having properly told them they could find punitive damages if they believed the evidence showed an aggravated assault. The only error now relied upon for a reversal of the judgment is, that the court permitted the plaintiff to prove he had employed counsel to attend

to his suit, and that he had himself come three times from St. Louis to attend to the case, and thereby lost four days.

This evidence was not legally admissible against the objections of the defendant, and we should reverse the judgment if it were not evident, from the entire record, that the admission of this evidence cannot have influenced the verdict of the jury. The jury knew, without proof, that the plaintiff had employed counsel to attend to his case, for they saw the counsel before them. They knew the plaintiff lived in St. Louis, for that fact had already been proven without objection, and knowing that fact, they would presume he could not attend a trial in Morgan county without losing several days' time. No evidence was given as to what fee plaintiff was to pay counsel, or what expenses he had incurred in coming from St. Louis, or the pecuniary value of the time lost. But besides all this, it is perfectly evident that the jury found their verdict upon the basis of punitive damages, with which the loss by plaintiff of four days' time had nothing whatever to do. Plain as it is that this evidence had no influence on the finding of the jury, and just as their verdict was, we are not disposed to reverse this judgment for an error which can have worked the appellant no prejudice.

The judgment of the court below must be affirmed.

Judgment affirmed.

THE HARTFORD FIRE INSURANCE COMPANY

v.

ISAAC VANDUZOR.

1. MOTION—*must be preserved by bill of exceptions.* Where the action of the circuit court upon a motion to remove a cause from the State to the Federal

court, is assigned for error, such motion only becomes a part of the record, and is properly before the court for review, by means of a bill of exceptions.

2. VERDICT—*in assumpsit.* A jury returned as their verdict in an action of assumpsit: "We, the jurors in the case of Isaac Vanduzor *v.* The Hartford Fire Insurance Company, find for the plaintiff, and fix the judgment at five hundred dollars in his favor." *Held*, that this was sufficient in substance, and that the court might have reduced it to form; and that under the statute of amendments and jeofails, it must be treated as amended and reduced to form.

3. PRACTICE—*pleadings lost—may be supplied by copies.* It is a familiar rule of practice, where the pleadings in a cause are lost, to permit them to be supplied by copy. And in cases where the papers have been mislaid, or are in the hands of one of the parties, or his attorney, and cannot be had, the court may, in the exercise of a sound discretion, permit them to be supplied by copies, in order to avoid a continuance of the cause.

4. SAME—*papers filed in a cause—should not be removed—unless by leave of court.* All papers filed in a cause should be preserved by the clerk in his office, and should not be removed therefrom except by leave of the court.

5. NEW TRIAL—*because attorney did not know when the term of the court was held—at which judgment was rendered.* A new trial will not be awarded, on the ground merely, that the attorney of the party against whom judgment was rendered did not know when the term of the court was held at which the judgment was taken, and hence failed to appear and defend the suit.

6. SAME—*to entitle party to a new trial—he must show diligence.* The time for holding the various courts of this State is fixed by statute, and it is the duty of attorneys and parties to know, and the law charges them with a knowledge of, the time so fixed, and if they neglect to inform themselves, the effect is the same as if they had actual knowledge, and failed to attend. In such case, a party, to entitle himself to a new trial, must show that he has used reasonable diligence.

APPEAL from the Circuit Court of Ford county; the Hon. A. J. GALLAGHER, Judge, presiding.

The opinion states the case.

Mr. STEPHEN R. MOORE, for the appellant.

Mr. M. HAY and Messrs. GREENE & LITTLER, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by appellee, in the Iroquois Circuit Court, against appellant. The declaration contained the common counts. Appellant entered an appearance and moved the court to transfer the case to the Circuit Court of the United States for the Northern District of Illinois. An affidavit and bond were filed upon which the motion was based. The court overruled the motion. Appellant thereupon filed the general issue and a special plea, to the latter of which appellee filed a demurrer, which was sustained and leave given to amend, but no amended plea was ever filed. Subsequently the venue was changed to the circuit court of Ford county, on the application of appellant.

At the next October term of the Ford Circuit Court a trial was had in the absence of appellant's attorney and agent. The jury found a verdict in favor of appellee for $500 damages. Appellant's attorney, before judgment was rendered on the verdict, entered a motion for a new trial, which was overruled by the court, and judgment was rendered, and to reverse which the case is brought to this court on appeal, and various errors are assigned.

It is first insisted that the court below erred in refusing to certify the case to the United States Circuit Court, under the act of congress of 1789. The overruling of the motion, the bond, and the affidavit upon which it was based, were not preserved in a bill of exceptions. It is only in that mode that they could become a part of the record. Nor is there a bill of exceptions, showing that any exception was taken to the decision of the court in overruling the motion. This court cannot know, except by the record, that any exception was taken, nor can we examine the affidavit and bond unless they appear in a bill of exceptions. They did not become a part of the record by being filed by the clerk, or copied by him into the transcript. It is, therefore, unnecessary for us to

express any opinion whether the bond and affidavit are sufficient, or whether a corporation is entitled to remove a case from the State court to the United States court, under the act of congress.

It is objected that the verdict is defective, and insufficient to sustain the judgment. The jury say they find for the plaintiff, and "fix the judgment at five hundred dollars." It is apparent that this verdict is not formal, as, in the form of action they were trying, they should have assessed the damages, and that was, no doubt, what they intended. In fact, no other construction can be given to the verdict. They had heard the evidence, and found the issues for the plaintiff, and it is apparent that they had considered the evidence before them on the question of damages, and they say that the damages are $500, not in terms, but in substance. We can give the verdict no other construction. Being sufficient in substance, the court below might have reduced it to form, and, under the statute of amendments and jeofails, it will be treated as having been amended and reduced to form. We do not perceive any force in this objection. This case is unlike that of *Patterson* v. *Hubbard*, 30 Ill. 201, as in that case there was no finding of the estate held by plaintiff, which is expressly required by the ejectment law. From the finding in that case it could not be inferred what estate was in the several plaintiffs.

It is insisted that the court erred in permitting appellee to file copies of the pleadings, upon which to try the case. Where papers are lost, no rule of practice is more familiar than to permit them to be supplied by copy. If such a power did not exist in courts, justice would be greatly delayed, if not altogether defeated, in many cases. And such amendments are generally allowed, almost as a matter of course, in furtherance of justice. And for the same reason, if the papers are mislaid, or in the hands of one of the parties, or his attorney, and cannot be had, to avoid a continuance, the court may, no doubt, in the exercise of a sound discretion, permit their place

to be supplied by copies. This would seem to be necessary, to prevent delay and great wrong which would be liable to occur from negligence of officers and attorneys who have charge of, or access to, the papers in a cause. In this case, so far as this record discloses, appellant's attorney seems to have not only taken the papers from the office of the clerk, but even from the county and the circuit, and, so far as we can see, without the permission of the court. All papers filed in a cause should be preserved by the clerk, and their proper depository is the office of the clerk, and such papers should not be taken from the office, except with leave of the court. Whether there was a rule of the court below authorizing them to be withdrawn in the manner indicated by this record, does not appear, but we cannot presume that the court could have permitted them to be withdrawn to be held beyond a term of the court. It was the duty of appellant to have the papers returned before the term of court at which the cause was tried, if they were taken rightfully from the county, and having been in default in not returning them, and having occasioned the necessity of filing copies it is not for appellant to complain. From our observation and intercourse with the bar of our State, we should be slow to believe that any member of the profession would resort to an act so unprofessional as to attempt to procure a continuance by withdrawing and withholding the papers in a cause. We therefore presume, that in this case, the papers were withheld through inadvertence, and not from design.

In regard to the motion for a new trial, it is apparent that there was a want of diligence. It appears from the affidavit filed, and upon which the motion was based, that the attorney of appellant did not know when the term of court was held. The time was fixed by a public statute of the State, which was accessible to all, and it would imply great indifference for the parties and attorneys in the case not to examine the law and learn the time. They could have resorted to other sources

of information, and it was their duty to know, and the law properly charges them with knowledge, and the effect of a want of such information must be the same as if they had actual knowledge and had failed to attend at the term. A party cannot willfully absent himself from the court and then claim a new trial, because he claims that he could have introduced evidence which would have reduced the verdict. Nor can he neglect the usual and ordinary precautions and sources of information that are open to him, and omit to know that of which the law charges him with a knowledge, and then claim that proceedings induced by his own negligence shall be set aside, and he be permitted to re-litigate the questions already determined. A party, to entitle himself to a new trial, must show that he has used reasonable diligence. Appellant has failed to do so in this case, and the motion was properly overruled.

We perceive no error in this record, and the judgment of the court below must be affirmed.

Judgment affirmed.

SCHOOL DIRECTORS

v.

CHARLES R. MILLER.

1. SCHOOLS—*districts—when divided—until division of the property and debts is made as required by statute—each district bound to pay its own debts.* School District No. 2 was divided, and a new district formed, known as District No. 6. After the division, district 6 contracted a debt for school purposes, and subsequently the two were consolidated into one district, known as District No. 2.

Afterwards, a re-division of this consolidated district was made, and District No. 5 was re-organized with all its former territory. *Held*, in an action against District No. 2, for the debt contracted by No. 6, that the defendant could not be held liable, it appearing that District No. 2 never received any benefit therefrom, but that the debt was made by District No. 6, for its own use; that at the time of the commencement of the suit, District No. 6 existed as a separate school district, and that upon the re-division of the consolidated district, no apportionment of the property, funds and liabilities had been made by the trustees, as required by the statute, whereby the payment of the debt had fallen upon District No. 2.

2. Where a school district is divided and a new one formed, the statute requires that the township trustees shall make a division of the property, funds and liabilities, in a just and equitable manner, and until such division is made, each district is bound to pay its own debts.

APPEAL from the Circuit Court of Randolph County; the Hon. SILAS L. BRYAN, Judge, presiding.

The opinion states the case.

Mr. JOHN MICHAN, for the appellants.

Mr. W. H. UNDERWOOD and Mr. J. B. JONES, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit in the recorder's court of the city of Sparta, Randolph county, brought by Charles R. Miller against the School Directors of District No. 2, in town 5 south, range 5 west, in that county, on a promissory note which the school directors of district No 6, in the same township, had executed to the plaintiff for money borrowed to build a school house in that district.

A judgment was rendered for the plaintiff, which, on appeal and trial in the circuit court, was affirmed.

To reverse this judgment the defendants appeal to this court.

It appears that on the 6th of April, 1863, school district numbered two was divided, and a new district established, known as school district numbered six. In October, 1864, a petition was presented to consolidate districts two and six into one district, which was allowed, and they were consolidated into one district known as district numbered two.

April 20, 1863, district six was organized by the election of a board of directors, of whom plaintiff was one, and on the same day they elected their president and clerk, who was directed to give public notice of a meeting of the legal voters of the district, to locate and purchase a site for a school house, and to determine the kind of house to be erected. On May 4, 1863, this meeting was held and duly organized, and the site selected, and the directors were instructed to borrow money on the credit of the district sufficient to build the house, and a two per cent. tax was directed to be levied.

All the money borrowed, including the amount of the note in suit, was applied to building the school house in district numbered six.

It further appears, that district six was existing as such, as a school district, with the same territory it had under its first organization—that district two never received any of the money borrowed by district six, the whole of it having been paid out for the site for the school house and for building the school house in district six.

We are at a loss to perceive by what process district two has become liable to pay a debt contracted by district 6, such district being in full life and having enjoyed all the benefits of this debt. On the authority of the case of *Bruffort* v. *Great Western R. R. Co.*, 25 Ill. 358, district two was not responsible for the debts of district six, unless the obligation had been expressly created, which is not shown.

If, upon a re-division of this consolidated district, the township trustees had apportioned the property, funds and liabilities of such divided district, as required by section 33 of the School Law, and this liability had fallen upon district two, there might be some ground for a recovery.

Apart from that, we cannot perceive the legal or moral obligation resting upon district two to pay the debts of district six. On this point the court refused to instruct the jury, where a school district was divided and a new one formed, that the trustees of the township concerned should make a division of the funds, property and debts in a just and equitable manner, and until such division be made, each district was bound to pay its own debts.

We think this is the spirit and meaning of section 33 of the school law, and the jury should have been so told.

The court also refused to instruct the jury, that if they believed from the evidence that district six did then, and at the time of the commencement of the suit, exist as a school district, and that said district is the identical district for whose use and benefit the debt sued for was made, they should find for the defendant. To the same effect is instruction numbered eight, which the court also refused to give.

We perceive no reason, on our theory of the case, and none has been shown, why these instructions were refused. Their refusal was error, and for the error the judgment must be reversed.

Judgment reversed.

HENRY WATSON

v.

ABRAHAM FLETCHER.

1. LEASE—*waiver of forfeiture—what acts of lessor will amount to.* Where the right had accrued, to declare a lease forfeited for non-payment of taxes which the lessee had covenanted to pay, and thereafter the lessor accepted from the lessee a year's rent in advance, and shortly after assigned the lease to another: *Held*, that these acts of the lessor amounted to a waiver of the forfeiture.

2. SAME—*assignee—bound by assignor's acts.* Nor in such case, does the assignee of the lessor acquire any right to declare a forfeiture, that right having been waived by the acts of his assignor.

APPEAL from the Alton City Court; the Hon. HENRY S. BAKER, Judge, presiding.

The opinion states the case sufficiently.

Messrs. L. & L. DAVIS, for the appellant.

Messrs. BILLINGS & WISE, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of forcible detainer, brought by the assignee of the lessor, against the assignee of the lessee, on the ground that the lease had been forfeited by the non-payment of taxes which the lessee had covenanted to pay. The land had been sold in 1867 for the taxes of 1866. In March, 1868, Allen, the original lessor, assigned the lease to the plaintiff, Watson, having, a few days before the assignment, accepted from the defendant a year's rent in advance. The acceptance of the year's rent in advance and the assignment of the lease,

were, undoubtedly, a waiver of the forfeiture. When the right to declare a forfeiture accrued to the lessor, upon the sale for non-payment of taxes, it was optional with him to do so or to continue the lease in force. He elected the latter alternative, as conclusively shown by his acts, and his subsequent assignee acquired no right to annul the lease for a default which his assignor had thus waived. The plaintiff, after the assignment to him, redeemed the land from the tax sale. If the defendant, on demand, should refuse to refund the money thus paid, perhaps such refusal would create a new ground of forfeiture, though this we do not decide, as the question is not presented.

The judgment of the court below is affirmed.

Judgment affirmed.

The Chicago, Burlington & Quincy Railroad Company

v.

Thomas Payne, Administrator of Albert Payne, deceased.

1. Instructions—*right of parties to have the law clearly stated in the instructions.* It is the right of every party to insist that the law applicable to his case shall be fairly and distinctly stated in the instructions, and it is not sufficient, that a part of the instructions contain a correct exposition of the law, if it is incorrectly announced in others.

2. Same—*when taken together—must be consistent.* Instructions given to a jury, should announce the law of the case with accuracy and precision, and when taken together be consistent, in order that the jury may be aided, and not misled, in arriving at a verdict.

3. NEGLIGENCE—*of comparative negligence.* Negligence, resulting in injury, is comparative, and it is not required that the plaintiff, in an action against a railroad company, to recover for injuries received by reason of the alleged negligence of the latter, shall be free from all negligence himself, or that he shall exercise the highest possible degree of prudence and caution, to entitle him to recover, if it appear the defendant was guilty of a higher degree of negligence.

4. But in cases of mutual negligence, to authorize a recovery by the plaintiff, the negligence on the part of the defendant must be so much greater than that of the plaintiff, as to clearly preponderate.

5. And where the negligence is equal, or nearly so, or that of the plaintiff is greater, he cannot recover.

APPEAL from the Circuit Court of Adams county; the Hon. JOSEPH SIBLEY, Judge, presiding.

The facts in this case sufficiently appear in the opinion.

Mr. N. BUSHNELL, for the appellants.

Messrs. SKINNER & MARSH, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action brought by appellee, as administrator of Albert Y. Payne, to recover compensation, under the act of 1853, for the alleged killing of Payne by the negligence of the employees of appellants. It appears, from the evidence, that deceased was driving in a covered buggy upon the highway, and at the place where the road intersected with the railway of appellants, and came in contact with a passing train, and was instantly killed.

It is averred in the various counts of the declaration, that the railway company kept no warning board at the crossing; that no bell was rung or whistle sounded to give notice of the approach of the train, as required by law, and the engineer in charge of the train was drunk at the time the accident occurred. The company denied negligence on their part, and allege that

there was a want of ordinary care on the part of deceased as he approached the railroad.

On the trial in the court below, there was a large amount of evidence introduced by each party, but inasmuch as the case will have to be submitted to another jury, we deem it improper to discuss its weight, or whether it supported the verdict. From a careful examination of the instructions given the jury, we are satisfied they do not announce the law to the jury so clearly and distinctly that we can see that they were not misled in arriving at their verdict. They seem to conflict, and to leave the jury a choice as to which class they should adopt. A party has the right to have the law applicable to his case fairly, clearly and distinctly stated in the instructions given to the jury. It is not sufficient to say the law in the case is correctly announced in a part of the instructions, if it is incorrectly stated in others.

This is the second of the plaintiff's instructions which the court gave to the jury:

"If the jury believe, from the evidence, that the defendant was guilty of gross negligence, under all the facts before them, in running its train to and over the common highway crossing, and thereby the death of Albert Y. Payne was caused, then, even though the deceased did approach such crossing with some and a less degree of negligence, while traveling on the highway, such negligence of the deceased would not destroy the plaintiff's right to recover in this action."

The third instruction given for appellees is this:

"Even if the jury believe, from the evidence, that the deceased, Payne, did with some negligence, on a highway, approach the railroad crossing of the same, yet, if the defendant recklessly and with gross negligence, approached with its train to and crossed said highway, and thereby caused the

death of the said Payne, as charged in the declaration, such negligence of deceased would not justify such gross negligence of the defendant."

Appellee's fifth instruction is this:

"It was the duty of the defendant to operate its train in coming to and crossing said highway with due care and precaution, to avoid injury to persons passing on said highway, and if by sounding the whistle of the locomotive or ringing the bell thereof, in such manner as could have been reasonably done under the circumstances, injury to the deceased would have been prevented, and by wrongful failure so to do, the death of said Payne resulted as alleged in plaintiff's declaration, then the jury should find the defendant guilty."

Appellee's sixth instruction is this:

"If the defendant had erected and maintained a post on its track, some 80 rods east from said highway crossing, at and from which its trains in approaching said crossing were accustomed, by whistle or ringing of a bell, to give notice of its approach to such crossing, and such whistle or ringing of bell would reasonably have prevented the accident in evidence, and on the occasion in evidence the defendant failed to ring a bell or sound a whistle, and that thereby, and the negligence of the defendant, the death of the deceased, Payne, was caused, as alleged in the declaration, then the jury should find defendant guilty."

It is the established doctrine of this court that, although a plaintiff may be guilty of negligence, still the defendant will be held liable if his negligence is greater than that of the plaintiff. Where the negligence producing the injury is equal or nearly so, or that of plaintiff is greater, then he cannot

recover. Although he may be guilty of negligence, yet if that of the defendant is greater, amounting to gross negligence, he would be liable. Negligence resulting in injury is comparative, and it is not required that the plaintiff shall be free from all negligence, or that he shall exercise the highest possible degree of prudence and caution, to entitle him to recover, if the defendant is shown to be guilty of a higher degree of negligence. The following cases announce and recognize this rule: *Chicago & Rock Island R. R. Co.* v. *Still*, 19 Ill. 500; *Chicago, Burlington & Quincy R. R. Co.* v. *Dewey*, 26 Ill. 255; *Galena & Chicago Union R. R. Co.* v. *Jacobs*, 20 Ill. 478; *Chicago, Burlington & Quincy Railroad* v. *Hazzard*, 26 Ill. 373: and a number of other cases might be referred to in its support.

In the case of the *Galena & Chicago Union R.R. Co.* v. *Dill*, 22 Ill. 264, it was said that where the company have erected the proper signs and notices at the point of intersection, the highway traveler should, under ordinary circumstances, heed its warning, and use proper precaution to avoid a collision, and failing to do so, negligence more gross on the part of the company only will render them liable for injuries received. It was also held, in that case, that each party had the right to use their respective roads, but in doing so they were required to use all reasonable precautions to prevent injury to the other. That the traveler on the highway had the same, but no greater right, to travel the highway over the track of the company that the latter had to pass over the highway, and that both should exercise prudence in the enjoyment of their several rights. But that road was not required by statute to ring a bell or sound a whistle.

If an individual in crossing a railroad track, is guilty of negligence, that does not authorise the employees to wantonly kill such individual. His negligence may be a wrong to the company, but he does not thereby forfeit his life. If his negligence produces injury to the company, the courts are open

to them for redress. And it would be monstrous to hold that because a person is careless in regard to his safety, he thereby renders himself liable to destruction, with impunity, by persons operating railroad trains. Such a doctrine can never be sanctioned in a court of justice. In such a case, the employees of the road should use every reasonable effort to prevent the destruction of the individual, although he is negligent. But at the same time, if the deceased so acted that it was not within the power of the engine driver to prevent the collision by the employment of reasonable diligence and effort, then the company are not liable.

It will be observed that the instructions given for the plaintiff, and which we have quoted, do not recognize the rule here announced; and although they would probably not mislead members of the profession, still, to men not versed in the rules of law, they were calculated to, and may, have misled the jury in this case.

It will be observed that these instructions do not state the rule of comparative negligence. The second only announces a rule that a less degree of negligence on the part of deceased would leave the company liable. This instruction does not define the degrees of negligence with accuracy. If the deceased was guilty of negligence, then the negligence of the company should have been so much greater as to clearly preponderate, as was said in the case of *Chicago, Burlington & Quincy R. R. Co.* v. *Dewey*, *supra*. But, taken alone and disconnected from the other instructions given for appellants, this instruction might not have been so far objectionable as to require a reversal.

The third is, however, more objectionable. It informs the jury that if deceased was guilty of some negligence, yet if appellants recklessly and with gross negligence crossed the highway and caused the injury, the company would be liable. The expression, "some negligence," is indefinite, and embraces every degree of negligence except the highest and most gross.

Even if deceased had been guilty of negligence approaching the most gross, the jury would have been warranted in finding for appellee, and that, too, although greater than the negligence of the employees of the company. Even though they were guilty of recklessness and gross negligence, if deceased was guilty greater recklessness and grosser negligence, the company would not be liable. And this instruction is liable to that construction.

The fifth instruction correctly defines the duty of the road, but entirely ignores the duty of the deceased. And as the defense was based on the theory of negligence of deceased, to the degree that would exonerate the company, this instruction should have been modified so as to announce the proper rule as to comparative negligence.

The sixth instruction fails to announce the rule as to comparative negligence.

Although the fourth instruction asked by appellants was incorrect and should not have been given, still it was not accurate as modified by the court before it was given. As modified, it ignored relative negligence of the parties, and failed to announce the proper rule, and may have contributed to mislead the jury. While the instructions given for appellants laid down a different rule from that announced in appellee's instructions, still the jury were, by all the instructions before them, left to select and act upon either rule as it might strike them as being most proper. In this the instructions were wrong, and should, when taken together, have been consistent, and have presented the law of the case with accuracy and precision, that the jury might have received aid thereby in arriving at a true verdict.

For the error in giving these instructions for appellee, and the giving of appellee's fourth instruction as modified, the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

Syllabus. Opinion of the Court.

CHRISTOPHER SHAFFER

v.

STEPHEN SUTTON.

1. PARTIES—*defendants—who have been summoned—not relieved from diligence by reason of sickness.* The mere fact that a party defendant is sick and unable to attend the court to which he has been summoned, does not excuse him from diligence in defending the suit.

2. INJUNCTION—*assessment of damages on dissolution.* In cases where an injunction has issued to restrain the collection of a judgment at law, it is not necessary that suggestions in writing should be filed as required by the act of February, 1861, before awarding damages upon dissolution of the injunction. Such case is within the act of 1845, and by that alone governed.

3. STATUTES—*act of* 1861—*relative to injunctions—does not repeal the law of* 1845. The act of February, 1861, on that subject, does not repeal the act of 1845, but was designed to provide for a class of cases not embraced within the last named act, among which an injunction to enjoin the collection of a judgment at law is not included.

APPEAL from the Circuit Court of Morgan county; the Hon. CHARLES D. HODGES, Judge, presiding.

The opinion states the case.

Messrs. KETCHAM & ATKINS, for the appellant.

Messrs. MORRISON & EPLER, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

At the March term, 1866, of the Morgan Circuit Court, Stephen Sutton, as administrator of the estate of Jacob Emerick, deceased, obtained a judgment by default, after due service of process, against Christopher Shaffer, for money alleged to have been received by Shaffer, belonging to

Emerick's estate, for $1,100. An execution was duly issued on this judgment, and was in the hands of James Dick, the sheriff of Cass county, to which county it was directed, and was levied upon Shaffer's land.

Shaffer filed his bill of complaint, to enjoin the execution and all proceedings on the judgment, and an injunction was granted by the master in chancery. The principal ground for the injunction, was the allegation that he had no notice of the pendency of the suit in Morgan county; that the process served upon him, was, as he supposed, a subpœna to attend the court as a witness, and that he would have attended court in that capacity had he not been prevented by sickness, rendering it impossible for him to travel. He denies, in his bill, all indebtedness to the estate of Emerick.

The answer of the administrator, Sutton, alleges that the process was duly served upon the complainant, and states in full the foundation of the claim against complainant, by which it would appear that Emerick died in debt to Sutton, and left in cash, at his death, about $1,025, which his widow gave to one Henderson for safe keeping; that complainant was the son-in-law of Emerick, and soon after his burial, the complainant and his wife, a daughter of the deceased, and a son, Andrew, since dead, and another son, living in Ohio, met at the residence of the deceased, when Henderson delivered this money to the complainant, taking his receipt for it, and thereupon complainant divided it out among the heirs at law of the deceased, namely, Andrew, the son from Ohio, and himself, in right of his wife, being three in all.

The cause was heard upon the bill, answer, replication and testimony, and a decree dissolving the injunction, with five per cent. damages, and dismissing the bill, was rendered.

To reverse this decision, the complainant has appealed to this court.

It appears that complainant was sick during the month of March, 1866, and during his sickness he spoke of writing to

some one, or getting some one to attend to the law suit, in which the writ had been served, or getting some one to write.

That this money was paid over to Shaffer, the complainant, by Henderson, is indisputable. The widow states the transaction in the clearest manner, and it was principally upon her evidence, we presume, the judgment was rendered in the circuit court. She refutes the statements of complainant that he did not receive the money. The fact is fully established, that he did receive it.

It was proved by the deputy sheriff, who served the original summons upon the complainant, that he explained to him what it was for, and advised him to attend to it, or judgment would be rendered against him. He replied that he owed Sutton nothing.

The record shows the judgment recovered in the Morgan Circuit Court by Sutton, as administrator of Emerick, against complainant, was just and equitable, and his denial of any indebtedness, was false and unfounded. Under the proof, the court could have rendered no other decree. The fact that a party defendant is sick and unable to attend the court to which he has been summoned, does not relieve him from the duty of diligence. This complainant could, as he proposed to do, have employed counsel to make his defense, if he had one, but it is very apparent he had no defense of any kind. The pretense that he did not know it was a summons, but only a subpœna, that was served upon him, is equally false and unfounded, as is shown by the officer serving it.

It is objected by complainant, that the court, on the dissolution of the injunction, assessed damages without suggestions in writing, as required by the act of 1861, and therein erred.

This act was not designed to, and does not, repeal the act of 1845. It provides for cases not embraced in the last named act. This case comes directly within that act, as it was an injunction to stop the collection of a judgment at law, and for no other purpose. The act of 1861 provides for damages

resulting from injunctions obtained in that large class of cases where a money recovery is not the subject of controversy, and they are so various as not to be particularized. In such cases, some suggestion, which is in the nature of a declaration, is necessary, to apprize the opposite party of the character or nature of the claim for damages, out of what it arises, and how the party has been injured. Not so, where an injunction to enjoin the collection of a judgment is sought. There the amount enjoined furnishes the extent of the claim—it appears on the face of the bill, and consequently, no suggestions, as such, are necessary.

Perceiving no error in the record, the decree must be affirmed.

Decree affirmed.

HORACE BILLINGS

v.

CHARLES SPRAGUE.

1. INJUNCTION—*in cases to enjoin collection of a note—bond may provide for payment of the debt.* In a suit to enjoin the collection of a promissory note, the statute prescribes no rule in regard to the conditions to be inserted in the injunction bond, and in such cases, the judge or master granting the writ, may require a complainant to give security for the payment of the note, in the event he fails to maintain his suit.

2. SAME—*bond conditioned to pay the debt—surety liable therefor—upon dissolution of the injunction.* And in injunction cases of this character, where the bond is conditioned for the payment of the debt, the liability of the surety therefor becomes fixed, upon the dissolution of the injunction, and a recovery may be had against him, in an action upon the bond.

3. SURETY—*debt paid by surety—on an injunction bond—rights of.* And where, in such suit, the note enjoined is secured by a deed of trust, and the bond

provides for its payment, in event the injunction is dissolved, the surety, when he shall have paid the debt, will be substituted in equity to the lien under the trust deed.

4. INSTRUCTION—*directing the finding.* In an action upon an injunction bond, the court instructed the jury what amount to find. *Held*, that this was erroneous. But, inasmuch as it appeared from the record that the verdict could not have been for a less sum, being simply the amount of the debt, which rested merely in computation, the judgment would not, for such error, be reversed, and the parties put to the additional costs of a new trial.

APPEAL from the Circuit Court of Cass county; the Hon. JAMES HARRIOT, Judge, presiding.

This was an action of debt upon an injunction bond, instituted in the court below, by the appellees, Charles E. Parker and Charles Sprague, for the use of Charles Sprague, against the appellant, Horace Billings, impleaded with Frederick Potter. The further facts in this case are fully stated in the opinion.

Mr. H. E. DUMMER and Mr. L. LACEY, for the appellant.

Mr. G. POLLARD, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

On the 27th of February, 1866, Potter filed a bill in chancery to enjoin the sale of certain real estate conveyed by him to one Parker, in trust to secure the payment of a note for $510, given by Potter to Sprague. The bond was conditioned that Potter, and Billings, the surety, should pay to Sprague all moneys and costs due or to be due to him, and all damages which might be awarded. The injunction was subsequently dissolved, and this is a suit upon the bond. The circuit court gave judgment for the amount of the note, and attorneys' fees in the injunction case. It is conceded that the fees were

recoverable, but denied that the court had the right to include the amount of the note.

In injunction cases of this character, the statute prescribes no rule in regard to the conditions to be inserted in the bond. This is left to the discretion of the judge or master granting the writ, and where the object of the bill is to enjoin the collection of a promissory note, as in the present case, it is not an unreasonable exercise of such discretion to require the complainant to give security for the payment of the debt, in case he fails to maintain his suit. This was done in the present case. Such was the evident object of the bond. It will bear no other construction. It was voluntarily executed by the appellant as surety, and he must respond to its conditions. The judgment of the circuit court was in accordance with the obligation. The appellant, however, will be substituted in equity to the lien under the deed of trust, when he shall have paid the debt.

It is urged that the third instruction for the plaintiff was wrong, inasmuch as it directed the jury what amount to find. It was clearly error, and would be ground for reversing the judgment, if it were not apparent, from the record, that the jury could not have found a less sum, and that, if we were to remand the case, the result could not be more favorable to the appellant, while both parties would incur additional costs. The jury gave as their verdict the amount of the debt, which rested merely in computation, and $25, fees of counsel, which was the lowest sum named in the evidence as a proper fee. Under these circumstances, it would not be proper to reverse the judgment for this error in the instruction.

Judgment affirmed.

Syllabus. Statement of the case.

JOHN S. WILLIAMS

v.

ROBERT H. IVES.

1. TWO NIHILS—*in proceeding to foreclose a mortgage by scire facias.* In a proceeding to foreclose a mortgage by *scire facias*, a judgment of foreclosure may be entered without personal service, upon a return of two *nihils* upon writs issued and returnable to different terms of the court, notwithstanding both writs were returned on the same days they were issued.

2. JUDGMENT *in such case—its form.* The judgment in a proceeding by *scire facias* to foreclose a mortgage, found the amount due upon the mortgage, and directed, first, that the plaintiff recover of and from the defendant the sum so found to be due, and then awarded a special execution for a sale of the mortgaged premises. This was held to be a judgment *in rem* and not *in personam.*

WRIT OF ERROR to the Circuit Court of Piatt county; the Hon. CHARLES EMERSON, Judge, presiding.

This was a proceeding by *scire facias* to foreclose a mortgage, instituted in the court below, by Ives against Williams. Two writs of *scire facias* were issued, returnable to different terms of the court, and both returned "*nihil*," but the return was made in each instance on the same day the writ issued.

A default was entered and final judgment rendered in the following form:

"Now, on this 25th day of March, A. D. 1863, comes the plaintiff, by Messrs. Stuart, Edwards & Brown, his attorneys, and it appearing to the court that a writ of *scire facias*, and also, an *alias* writ of *scire facias*, have been returned by the sheriff, "*nihil*," and the said defendant, being now three times solemnly called, comes not, but makes default. It is therefore considered by the court, on motion of the plaintiff's attorney, that his default be entered. And it appearing to the court that this suit is instituted to foreclose a certain deed of

mortgage filed herein, it is ordered by the court that said mortgage and the notes therein described, and secured thereby, be referred to the clerk, to assess the amount due thereon, and the clerk having reported that there is now due from the said defendant, to the said plaintiff, upon the said notes and mortgage, the sum of thirty-five thousand, eight hundred and seventy-five dollars and sixty cents; which report being approved by the court, it is therefore considered and adjudged by the court, that the plaintiff recover of and from the said defendant, the said sum of $35,875.60, together with his costs by him about his suit in this behalf expended, and that a special writ of *fieri facias* issue for the sale of the lands described in said mortgage, to wit:" (describing the lands as in the mortgage.)

The defendant thereupon sued out this writ of error, and now insists, *first*, that the writs were returned prematurely, and *second*, that the judgment is *in personam*, and not *in rem*, as it should be.

Messrs. McCOMAS & EMERSON, for the plaintiff in error.

Messrs. STUART, EDWARDS & BROWN, for the defendant in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a proceeding by *scire facias* to foreclose a mortgage. The first writ was issued on the 8th day of March, 1862, directed to the sheriff of Piatt county, and it was returned on the same day by that officer, endorsed, "not found." This writ was returnable on the fourth Monday of the same month. An *alias* writ of *scire facias* was issued on the 4th day of August, 1862, returnable on the fourth Monday of that month. The sheriff returned this writ on the day it

was issued, endorsed, "the defendant not found." The circuit court, at the latter term, entered a default, no appearance having been entered, had the damages assessed, and rendered judgment for the amount due upon the mortgage, and awarded a special execution for the sale of the mortgaged premises. The record is brought to this court on a writ of error, and a reversal is asked, because the sheriff returned the writs before the return day, and because, as is contended, the judgment is *in personam*, and not *in rem*.

The 23d section of the statute regulating judgments and executions, authorizes a judgment to be rendered on the return of two writs of *scire facias*, endorsed by the sheriff, "not found." It fails to provide that the writ shall be retained by the officer until the return day of the writ. It simply declares that if two writs are returned *nihil*, the court shall proceed to hear the case. Under this provision the writs should, no doubt, be returnable to two different terms, and should be placed in the officer's hands, and he must serve the same, if practicable. But it many times happens that the sheriff knows that the defendant is absent from the county and that he will not return before the term of the court to which the writ is returnable. He may know that he is permanently absent; that he has absconded under such circumstances as render it morally certain that he will not return, or that some other reason renders it certain that service cannot be had. If, as contended, the writ should not be retained by the sheriff until the last day, why not until the last moment of that day? A sheriff should, in the service of process, act with diligence and in good faith, and retain the writ until the return day if there is any hope of obtaining service, but he may, at his peril, return it at an earlier period.

The ancient strict and formal rules of the British courts, in regard to service of process and rules on parties, have never obtained in our courts, and under the more modern practice of those courts the rules have become much relaxed, and many

mere formal requirements have been dispensed with, as tending in nowise to promote justice; hence, many of their rules are not applicable under our practice.

Again, there is not the same reason for personal service in a case of this character as obtains in ordinary proceedings. When a debtor executes a mortgage he knows that it will probably be recorded, and if so, that the mortgagee may, after the last installment becomes due, proceed to foreclose after having two writs returned *nihil*, and as this involves a delay until at least the second term after its maturity, and as he has twelve months to redeem after a sale, he cannot be taken by surprise, as, usually, as much as eighteen months must intervene after the maturity of the debt before his redemption is cut off by such a proceeding. It is not reasonable to suppose that a person of any degree of prudence will let such a length of time elapse after he knows that the mortgage can be foreclosed, without, at the very least, inquiring if any steps have been taken to foreclose his equity of redemption. These, with other considerations, no doubt, induced the general assembly to adopt these provisions as to service.

It has been held by this court, where relief is sought by a creditor's bill, that a return of an execution, "no property found," before the return day of the writ, is sufficient upon which to base such a bill. *Brown* v. *Parkhurst*, 24 Ill. 257. In that case it was said that the officer's return "becomes a matter of record, and is conclusive between the parties to the judgment and the officer, only to be questioned in an action for a false return. It shows *prima facie*, that the creditor has exhausted his legal remedy, and chancery has jurisdiction. A return cannot be compelled before the expiration of ninety days, but the sheriff may take the responsibility of doing so at an earlier day." The rule here announced is analogous in principle to the question under consideration. That, like this, related to the duty of an officer in the execution of a writ. In the case of *Neally* v. *Redman*, 5 Clark, (Iowa R.) 387, where

a service by leaving a copy of the summons was authorized in case the defendant could not be found, and the officer left a copy at the residence of the defendant on the day the writ issued, it was held to be a good service, and that the return was not prematurely made. In principle that case is the same as this. We are, therefore, of the opinion that the returns in this case were sufficient to confer jurisdiction on the circuit court to render the judgment.

It remains to determine, whether the judgment is *in personam* or *in rem*. In the case of *Russell* v. *Brown*, 41 Ill. 183, a judgment substantially similar to this, was held to be valid and binding. We there said, "the commencement of the judgment is, in form, *in personam*, it is true, but it proceeds to award a special execution against the mortgaged premises, describing them as described in the mortgage, and if there was an error in the form, it was one which could work the plaintiff in error no prejudice. She could not be made personally liable upon it, because the record would show that the proceeding was of a character in which a personal judgment could not be rendered, and the order of the court, taken as a whole, would be construed simply as fixing the amount due on the mortgage, and directing the sale of the mortgaged premises. It directs that the plaintiffs have and recover a certain sum from the defendants, and then directs how they are to recover it, to wit, by a sale of the premises. No court, inspecting the entire record and the entire judgment, would hold it to be anything more than a judgment *in rem*." That case is decisive of this question, and must control. The two judgments are essentially alike, and no reasonable distinction can be taken between them.

This judgment does not award a general execution, which is held to be error, but awards a special writ for the sale of the mortgaged premises, naming them in the judgment. We are unable to see that plaintiff in error could be prejudiced in the slightest degree by the form of this judgment. A special

execution was issued requiring the mortgaged premises to be sold, which was done, and the judgment was satisfied, and appellant could not be held liable for anything more under this judgment.

We perceive no error in this record, and the judgment of the court below must be affirmed.

Judgment affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* JOHN W. SHANK, County Treasurer and Collector of Edgar County,

v.

BENJAMIN O. NICHOLS.

1. JUDGMENT FOR TAXES—*at what time it may be applied for.* In counties adopting township organization, application for judgment against delinquent lands and for an order of sale, may be made to the county court at the July term. The collector is not compelled to make it at the May term.

2. ASSESSMENT ROLLS—*power of supervisors over them.* The only power the board of supervisors have over the assessment rolls is, to ascertain if the valuation in one town or district, bears a just relation to all the towns and districts in the county, and if it does not, the statute authorizes the board to increase or diminish the aggregate valuation of the real estate in any town or district, by adding or deducting such sum upon the hundred as may, in their opinion, be necessary to produce such relation.

3. EQUALIZING ASSESSMENTS. And in order to effect this just relation, the board must include unimproved as well as improved lands.

4. JUDGMENT FOR TAXES—*where a portion of the assessment is illegal.* Where a portion of an assessment is illegal, but the tax is so levied that the legal can be separated from the illegal, judgment may be rendered for the taxes legally assessed.

5. So, where a board of supervisors, in equalizing the assessments in the county, increased the valuation of improved lands in one of the townships,

without at the same time increasing the valuation of the unimproved lands in the same township, so that the order of the board of supervisors in that regard was illegal and void, on an application for a judgment against the lands for unpaid taxes, a judgment could be rendered for an amount according to the assessment as it stood before the same was increased by the board of supervisors, and for a sum less than that named in the collector's notice.

APPEAL from the Circuit Court of Edgar county; the Hon. JAMES STEELE, Judge, presiding.

This was a proceeding commenced in the county court of Edgar county, by John W. Shank, county treasurer and collector, at the July term, 1868, to procure a judgment and an order of sale of the delinquent lands in said county.

The defendant appeared by attorney, and resisted the application. The county court rendered judgment against the lands for the amount due, based upon the assessment made by the township assessor, and refused to render judgment for the amount due according to the increased valuation made by the board of supervisors. An appeal was prosecuted to the circuit court of Edgar county, and the court there found for the defendant, and dismissed the application; whereupon the plaintiff appealed to this court.

Mr JAMES A. EADS, for the appellant.

Mr. JOHN W. BLACKBURN, for the appellee.

Mr. CHIEF JUSTICE BREESE delivered the opinion of the Court:

Three questions are presented by the record, which are,—

1st. Had the treasurer and collector the right to make his application to the court for judgment and order of sale at the July term, 1868, or was he compelled to make it at the May term of said court?

2d. Had the board of supervisors, in equalizing the assessments, the right to increase the valuation of improved lands

in Shiloh township, without at the same time increasing the valuation of the unimproved lands in said township?

3d. If the court should find the application could be properly made at the July term, 1868, and that the order of the board of supervisors increasing the valuation of improved lands was illegal and void, then could the circuit court render a judgment against the said lands for a less amount than the sum named in the treasurer and collector's notice, the treasurer and collector having offered on the trial to take a judgment for the amount according to the assessment as it stood before the same was increased by the said order of the said board of supervisors?

It has been held by this court in several cases, *Parks et al.* v. *Miller*, 48 Ill. 360; *Stillwell* v. *The People*, *ante*, 45, that the application for judgment and for an order of sale can be made at the July term, and that the collector is not compelled to make it at the May term. The first question is answered in the affirmative.

The second question is answered in the negative. The only power the board has over the assessment rolls, is to ascertain if the valuation in one town or district bears a just relation to all the towns and districts in the county; if it does not, the board can increase or diminish the aggregate valuation of the real estate in any town or district, by adding or deducting such sum upon the hundred as may, in their opinion, be necessary to produce this just relation between all the valuations of real estate in the county. Laws of 1861. sec. 15, p. 243. This, of course, would include unimproved as well as improved lands. They must be included to effect this just relation.

The third question must be answered in the affirmative, according to repeated rulings of this court. *The State* v. *Allen*, 43 Ill. 456; *Allen* v. *Peoria & Bureau Valley R. R. Co.*, 44 ib. 85, and *Laflin* v. *The City of Chicago*, 48 ib. 449. These cases hold, where a tax is so levied that the legal can

be separated from the illegal, judgment may be rendered for the taxes legally assessed.

Though the proceeding is *in rem*, it must not be so strictly construed as to render it wholly nugatory. It is both reasonable and just, a judgment should pass against the property for all such taxes as are legally assessed upon it.

This point has been so often decided that it is unnecessary to elaborate it.

The judgment of the circuit court is reversed, and the cause remanded.

Judgment reversed.

JAMES CRABTREE *et al.*

v.

JOHN W. FUQUAY.

NEW TRIAL—*verdict against the evidence.* In this case the judgment was reversed on the ground that the finding of the court was against the evidence.

APPEAL from the Circuit Court of Edgar county; the Hon. JAMES STEELE, Judge, presiding.

The opinion states the case.

Mr. JAMES A. EADS, for the appellants.

Mr. R. N. BISHOP and Mr. JOHN SCHOLFIELD, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of replevin, brought by Fuquay, against James and John Crabtree, to recover certain cattle. The trial was by the court, and resulted in a verdict for the plaintiff. Although the record presents only a question of fact, we feel constrained to reverse the judgment, in order that there may be a fuller investigation of the merits of the case. One Russell Fuquay, in November, 1866, bought of James Crabtree, 100 fat hogs, 100 stock hogs, and a quantity of standing corn, hay and pasture. He paid $1,450, and turned into one of the fields about 65 head of cattle, which are the cattle in controversy. He took away the fat hogs, and subsequently sold the cattle to Donehue & Doty, who sold them to the plaintiff, John W. Fuquay. Russell Fuquay proved to be insolvent, and such of the stock hogs as had not died, and so much of the corn as had not been consumed, were taken back by Crabtree at a valuation, still leaving a balance due him, even upon the testimony by the plaintiff.

The question in this case is, whether, by the arrangement between Crabtree and Russell Fuquay, the former was to have a lien on the cattle turned into his fields until the purchase money due him for the hogs, corn, hay and pasture was paid. He and John D. Crabtree, the latter a disinterested witness, swear he was to retain possession until paid. Russell Fuquay swears he was not. But he can be considered as hardly less interested in the controversy than James Crabtree, and the evidence of the latter is not only supported by that of John D. Crabtree, but by the extreme probability that such an agreement would have been made, in view of the fact that Fuquay was a stranger to Crabtree, a resident of Indiana, and insolvent. His evidence is also sustained by the fact that a

tender was made by the attorney of the plaintiff before bringing the suit, though for an insufficient amount.

In our judgment the finding of the court was against the evidence, and we must reverse the judgment and remand the cause for another trial.

Judgment reversed.

MARTIN SNIDER

v.

THOMAS S. RIDGEWAY, for the use of MESHACK PIKE.

1. PROMISSORY NOTES—*payable to the wife—at common law belong to her husband.* At common law, and independent of the statute, a note payable to the wife, belongs to the husband, and he may endorse it, or sue upon it and recover in his own name.

2. SAME—*rule—how affected by the married woman's act of* 1861. And this rule of the common law is not affected by the act of 1861, except in cases where the consideration for which the note was given belonged to the wife in her own right.

3. SAME—*payable to the wife—endorsed by her husband—assignee takes it at his peril.* And where a note payable to the wife, is endorsed by her husband, the assignee takes it at his peril, and should it afterwards appear that it was her property, the assignee would acquire no title.

4. SAME—*where payable to the wife—may be shown to belong to her husband.* And notwithstanding a note is made payable to the wife, it may be shown that the real ownership and title are in the husband.

5. GARNISHMENT—*note payable to the wife of a judgment debtor—may be reached by garnishee process.* And where a promissory note, made payable to the wife, belongs to her husband, such note, after its maturity, is liable to the process of garnishment issued by a judgment creditor of the husband.

6. SAME—*proceedings may be instituted before the note matures.* And it is no objection that proceedings in garnishment, to reach indebtedness on a promissory

note, were instituted before the maturity of the note, provided judgment is not rendered until after it falls due.

7. And in such case, where the payee of the note, upon the trial of the suit, fails to state that the note had been endorsed before maturity, and the defendant in the proceeding neglects to inquire of such witness whether the note had been transferred before it became due, the jury, under such circumstances, are warranted in finding that it had not been so endorsed.

APPEAL from the Circuit Court of McLean county; the Hon. JOHN M. SCOTT, Judge, presiding.

The facts in this case are fully stated in the opinion.

Messrs. TIPTON, BENJAMIN & ROWELL, for the appellant.

Mr. O. T. REEVES, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears from the record in this case, that Meshack Pike recovered a judgment against Thomas S. Ridgeway for $853.33 damages, and $136.85 costs of suit. Afterwards, on the 27th day of May, 1867, Pike filed an affidavit under the statute, and thereupon a summons in garnishee issued against Martin Snider, which was served on the 29th day of the same month. It appears, from the answer and the evidence in the case, that Snider, about the 1st of February, 1867, executed his promissory note for $1200, payable to the wife of Ridgeway one year after date. The cause was continued on the docket until after the maturity of the note, when a trial was had by the court and a jury, and a verdict was found in favor of Ridgeway, and a judgment was rendered in his favor for the use of Pike, and against Snider, for the amount of the judgment, interest and costs previously recovered by Pike against Ridgeway. A motion for a new trial was interposed

at the proper time, but was overruled and exceptions taken, and the case is brought to this court on appeal.

It is urged that, the note being payable to Mrs. Ridgeway, the indebtedness could not be reached by garnishee process. At the common law, and independent of the statute, a note payable to the wife belonged to the husband, and could be held and controlled by him. He may endorse it, or sue upon and recover it in his own name. Chitty on Bills, 22.

The act of 1861, usually known as the "married woman's law," has not changed the common law, unless the money be due to the wife in her own right. If it is given to her on the sale of her property, or on the loan of her money, then the husband could not interfere with or control it any more than could a stranger. And it may be that the fact that a note is payable to the wife is *prima facie* evidence that it is her note and not that of her husband. But if the consideration for which such a note is given belonged to the husband, it would be his note as at the common law, and as such he might hold and dispose of it as though it was specifically payable to him, but the assignee would take it at his peril, and if it should subsequently appear that it belonged to the wife he would acquire no title. And notwithstanding it is payable to the wife, it may be shown that the consideration for which it was given belonged to the husband. It then follows, that the real ownership and title to the note may in some cases be shown, and the *prima facie* ownership of the wife rebutted by evidence.

If it was proved in this case that the consideration for which Snider gave the note belonged to Ridgeway, and not his wife, then it was proved to be his note, and as such, it was, after maturity, liable to the process of garnishment; and a careful examination of the evidence in the record, satisfies us that the consideration belonged to Ridgeway, and not his wife. It was given for cattle and stock, which he had purchased, held and sold as his own. It is true, an effort was made to show

that the cattle were purchased with the money of his wife, but in this there was a signal failure. The testimony at most only showed that Mrs. Ridgeway, some twelve or fifteen years previously, had received some money from her father and brother, but even the amount is not shown, and that her husband had used it as his own since that time. That was prior to the passage of the act of 1861, and, by the law as it then stood, it became the absolute property of the husband. The evidence, at most, shows no more than a part of the money which the wife claims was paid for the stock for which the note was given.

It is also insisted that the proceeding was premature, and that it could not be resorted to before the maturity of the note. No valid objection is perceived to commencing the proceedings in garnishment, to reach indebtedness on a promissory note not then due, so the judgment be not rendered until after its maturity. The 17th section of the attachment act authorizes the rendition of judgments on debts not due, with a stay of execution until after they become due, but expressly prohibits the rendition of judgments for debts founded on negotiable instruments, until they shall be mature. We are, therefore, of the opinion that the court had power to render this judgment, although the summons in the proceeding was sued out and served before the note fell due.

It is also urged that the verdict was not sustained by evidence that Ridgeway or his wife held the note when the trial was had. It is no doubt true, that it must appear that the note had not been assigned before its maturity, but that may be shown or inferred from any legitimate evidence. When one person gives a note to another, it is not an unreasonable presumption to conclude that the payee still holds it, unless circumstances indicate the contrary, and that presumption is greatly strengthened when the payee is on the stand and testifies in the case, but fails to state that he has endorsed it, and the defendant in the garnishee proceeding fails to ask him

whether it had been transferred before it became due. It may be that the mere presumption, in the absence of all circumstances but the giving the note to the payee, would not be, of itself, sufficient evidence that it had not been assigned; still, when the payee is placed on the stand as a witness, and the debtor fails to ask whether it has been transferred, and the payee is silent on the point, a jury is warranted in finding that it had not been endorsed. And this is especially true, as the note does not seem to have been presented for payment after maturity. Had it been negotiated, it is only reasonable to suppose that it would have been presented at, or immediately after, its maturity. In all cases, it is proper that the jury should be reasonably well satisfied that the note has not been endorsed before it became due, but we are of opinion that the evidence fully warranted the conclusion at which they arrived.

Perceiving no error in this record, the judgment of the court below must be affirmed.

Judgment affirmed.

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2. In such cases, the practice would not be regular, even if it could be done, to raise this question on mere motion; but where either of these facts has been shown under a plea in abatement, the presumption of jurisdiction is rebutted. Ibid. 482.

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OF THE PLACE OF TAKING.

1. *Must appear from the certificate.* It must appear from the certificate of acknowledgment where it was taken and certified; or, by taking the deed and certificate together, the court must be able to presume in what State it was taken. *Hardin et al.* v. *Kirk*, 153.

2. In this case, the venue to the certificate was, "County of New York." The deed recited that the grantor had formerly been in business in the city of New York, but it failed to state that he was in the

ACKNOWLEDGMENT OF DEEDS. Of the place of taking. *Continued.*

State and county of New York at the time the acknowledgment was taken, nor was there anything in the body of the deed from which it could be inferred that it was taken in the State of New York, and the certificate failed to show it was taken in that State. The acknowledgment was held insufficient. *Hardin et al.* v. *Kirk*, 153.

ACTIONS.

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ADMINISTRATION OF ESTATES.

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1. *Of his power in that respect.* If an executor loans the money of the estate, unless authorized or required in the will, he does it in his own wrong, and it operates as a *devastavit*, and creditors, legatees and distributees may sue and recover on his bond. The law requires him to reduce the assets to money, pay the debts and discharge the legacies, or distribute the fund among those entitled to receive it. *Johnston* v. *Maples et al.* 101.

Furnishing necessaries to minors by executor.

2. *Compensation allowed.* Where the legatees are minors, and have no guardian, the executor may furnish them necessaries, and will be allowed all reasonable and fair allowances for moneys necessarily expended in their support, and he may charge a reasonable sum as compensation for so doing. Ibid. 101.

ADMINISTRATION OF ESTATES. *Continued.*

"EXHIBITING" A CLAIM AGAINST AN ESTATE.*

3. *What constitutes.* On the day appointed by an administrator for the adjustment of claims against an estate, and within two years after letters of administration were granted, a creditor of the estate filed his claim in the probate court: *Held*, that the claim was "exhibited" in the manner and within the time required by law to prevent the bar of the two years statute of limitations in regard to the presentation of claims against estates, notwithstanding there was no special order of continuance from term to term, and the claim was dropped from the docket for a period of over three years before its final adjudication. *Barbero* v. *Thurman, Admr.* 283.

ADMINISTRATOR'S SALE OF LAND TO PAY DEBTS.

4. *Cannot be made except to pay existing debts.* An order to sell the real estate of a decedent will not be made except to pay debts due and owing at the death of the decedent. *Fitzgerald* v. *Glancy, Admr.* 465.

5. *Order to sell real estate to pay debts contracted by the administrator—void.* And an order of the county court directing the sale of the real estate of a deceased person, to pay debts which were created by the administrator after the death of the intestate, is void. Ibid. 465.

6. *The expenses of unnecessary administration—not such a debt as would justify a sale of the land.* And where, at the time letters of administration are granted, there are no debts existing, and no question of distribution requiring the intervention of an administrator, the expense of administering, the result of unnecessary interference, can not be regarded such a debt as would justify a proceeding to sell the land to pay it. Ibid. 465.

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1. Where a person in charge of a warehouse purchases grain, and ships it in the name of the owner of the warehouse, and he advances

*See *Mason* v. *Tiffany, Admx.* 45 Ill. 393.

AGENCY. When an agency exists. *Continued.*

money to him on such shipments, and the purchaser ships none in his own name, it may be inferred that the person making the purchases is the agent of the person in whose name it is shipped, and the latter will be held liable to a person to pay for grain of whom a portion so shipped was purchased. *Malburn* v. *Schreiner*, 69.

Authority of agent.

2. *When sufficient.* Where a petition for a mechanic's lien alleges that the son of a widow, who was the owner of a mill, contracted for machinery to place therein, as well for himself as for the mother, with her knowledge and consent, and as her agent: *Held*, that it was sufficient on demurrer. But, to succeed, it must be proved that the son had authority from the mother to make the contract; that his mere possession of the mill, as agent or otherwise, is not evidence of authority to bind any interest other than his own. *Baxter* v. *Hutchings et al.* 116.

Power to rescind.

3. *Does not follow from an authority to make a contract.* K exchanged a horse for a mare belonging to E, through A, acting as E's agent. The mare proved unsound, whereupon K took her to A and requested him to return the horse. A replied that E had the horse, and that K must go to him. This K failed to do, and never at any time offered to E to return the mare, or demanded his horse, and afterwards brought replevin against E. Upon the trial, the court, in one of its instructions to the jury, *assumed* that the agency of A continued *after* the trade, so as to authorize him to rescind the contract: *Held*, that this was erroneous; that the mere fact that E authorized A to sell his mare did not empower him to rescind the contract at a subsequent time, and after E had received the horse. *Ellington* v. *King*, 449.

Relation between principal and agent.

4. *Agent—in treating with principal—must disclose all things connected with his agency.* Where a party accepts the position of an agent to take charge of the lands of his principal, collect the rents and royalty, and pay the taxes, a fiduciary and confidential relation is thereby created in regard to everything relating to such lands; and in treating with his principal for the property, the agent is bound to make the fullest disclosure of all matters connected therewith, within his knowledge, which it is important for his principal to know, in order to treat understandingly. *Norris et al.* v. *Tayloe*, 17.

5. *Concealment of facts by an agent—avoids the sale*.* And when an agent, occupying such a relation to his principal, purchases the property at a greatly inadequate price, by concealment of facts and information,

*See *Staley, Admx.* v. *Dodge et al. Admrs.* 50 Ill. 43.

AGENCY. RELATION BETWEEN PRINCIPAL AND AGENT. *Continued.*

relating thereto, which he was bound to disclose, the sale will be set aside. *Norris et al.* v. *Tayloe*, 17.

6. *Purchaser from the agent—whether protected.* See PURCHASERS, 1.

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7. *That creditor will look to him for payment.* Where a person in possession of the property of another, without the knowledge and consent of the owner, exchanges the same for other property, and gives his individual note for the difference, and without disclosing the fact of ownership in another at the time of making the exchange, and afterward the owner receives the property so taken in exchange, thereby ratifying the act of such person as his agent; and the payee of the note, after learning the fact that such person acted as agent in the transaction, fails to notify the principal that he should look to him for the payment of the note, until after the principal has settled with the agent, and in such settlement had paid the agent the amount which he had given his individual obligation to pay: *Held*, that the principal was thereby discharged from any liability to the payee of the note. *Fowler* v. *Pearce*, 59.

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OF SEPARATE APPEALS BY DIFFERENT PARTIES.

2. *Are independent of each other.* In a suit for partition, the proceedings had progressed to a sale of the premises, the sale set aside and a re-sale ordered, whereupon the master who was ordered to make the second sale, reported that the purchaser refused to receive back the money which he had paid on his bidding at the sale, and thereupon one of the defendants prayed and was allowed an appeal; on the same day this appeal was prayed, and before it was perfected by the giving of a bond, the purchaser sought to be made a party to the proceeding, and also prayed an appeal. After the appeal first prayed was perfected, the application of the purchaser to be made a party and to be allowed an appeal, was granted, and his appeal was also perfected: *Held*, that these appeals were properly allowed, and that they were in all respects independent of each other. *Comstock et al.* v. *Purple et al.* 159.

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1. *Whether justifiable.* It is the duty of a police officer, if he knows a felony has been committed in his jurisdiction, and there is good reason to suspect a particular person as being the guilty party, to arrest him and take him before a magistrate for examination. *Marsh et al.* v. *Smith*, 396.

2. But there must be a strong conviction, from the circumstances, that the party arrested was the felon, for if it should appear there were no such circumstances, a jury can exercise a wide and liberal discretion as to the damages they will give the injured party. Ibid. 396.

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BY THE CLERK.

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When assigned by the husband, assignee holds subject to the rights of the wife. See MARRIED WOMEN, 6.

ATTACHMENT.

AGAINST SEVERAL DEFENDANTS.

1. *Whether sustained as to all.* In a proceeding by attachment, against H and S, the affidavit alleged two grounds for suing out the writ—1st, that H was about to depart the State, with the intent to remove his effects, to the injury of his creditors, and, 2d, that H and S were about fraudulently to sell and assign their property and effects, so as to hinder and delay their creditors. The defendants filed separate pleas traversing the affidavit: *Held*, that the proof having failed to sustain the cause alleged against S, a recovery could not be had against both defendants,

ATTACHMENT. AGAINST SEVERAL DEFENDANTS. *Continued.*

by proving the first allegation against H. *Lawrence et al.* v. *Steadman et al.* 270.

2. *Only those who are brought by the affidavit within the provisions of the statute—can be proceeded against.* In proceedings by attachment, the affidavit must bring those against whom the writ issues within the provisions of the act, and only those who are thus brought within its provisions can be proceeded against. Ibid. 270.

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1. *Proof that the complaining witness was unmarried.* In a prosecution for bastardy, the complaining witness spoke of herself as an unmarried woman at the time of the trial, and of the defendant as having "kept company" with her for a year and a half: *Held*, that the jury might properly understand this as meaning that the defendant had been paying his addresses to her with a view to marriage, thus implying she was an unmarried woman. *Durham* v. *The People*, 233.

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1. *Where there is a remedy at law—when the objection should be made.* The objection that a court of chancery has not jurisdiction because there is a complete remedy at law, where the subject matter of the bill is not foreign to the jurisdiction of a court of equity, should be made in the court below, and comes too late when made for the first time in this court. *Hickey* v. *Forristal et al.* 256.

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2. *Character of title required.* A complainant in a suit to quiet title is not bound to show a perfect title as against all the world, as in the case of a party seeking to recover possession. *Rucker* v. *Dooley et al.* 378.

3. *What character of relief is proper.* On a bill to quiet the title of the complainant, where it is alleged that a sheriff's deed executed to the defendant is a cloud upon such title, it will be proper, the facts warranting it, to quiet the title of the complainant by setting aside the sheriff's deed, but the court should not decree a conveyance by the holder of such deed to the complainant. Ibid. 378.

BILL OF REVIEW.

4. *Of the proper decree.* S obtained a decree by default, subjecting certain lands, the title of which was in the wife of M, to the payment of a judgment in complainant's favor against M. The decree made no exemption of homestead rights, and also directed, in addition to the payment of S's judgment, the payment of a judgment against M in favor of E, who was not a party to the bill. Whereupon M and wife filed their bill to set aside the decree, for errors apparent on its face, and also to enjoin the sale of the land, on the ground that it was then, and at the time of the rendition of the decree, the homestead of M's wife. The court below rendered a decree wholly setting aside this former decree, for the reason of the error committed in providing for the payment of E's judgment: *Held*, that this was error; that the court should merely have modified the former decree, by directing that that portion which related to E's judgment should be set aside, and directing, also,

CHANCERY. BILL OF REVIEW. *Continued.*

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OF THE RIGHT TO MAKE DEFENSE.

6. A defendant in chancery has a reasonable time within which to interpose his defense, by way of demurrer or answer, and, unless it is upon a bill *pro confesso*, or on a default to file an answer under the rules of practice, a final decree can not be rendered, except on a final hearing regularly had. *Western Union Telegraph Co.* v. *Pacific and Atlantic Telegraph Co.* 91.

CROSS BILL.

7. *Whether necessary.* One of two tenants in common of land filed a bill against the other for partition. The defendant had paid off an incumbrance on the common estate, whereby a lien accrued to him upon the interest of his co-tenant, for contribution, but it was held the lien could not be enforced in that suit by a sale, as no cross bill was filed for that purpose. *Titsworth et al.* v. *Stout*, 81.

8. Though, under the partition act of 1861, the court could, without a cross bill, have decreed that the complainant should take his allotment subject to the equitable lien of the defendant for one-half the money the latter had paid to remove the incumbrance, as that act expressly authorizes the apportionment of incumbrances. Ibid. 81.

9. *Of a decree without answer or default.* It is error for the court to render a final decree upon the filing of an amended cross bill granting the relief thereby sought, when no answer had been filed thereto by the defendants, nor any steps taken to place them in default. *Western Union Telegraph Co.* v. *Pacific and Atlantic Telegraph Co.* 91.

CHATTEL MORTGAGES. See MORTGAGES, 2, 3, 4.

COLOR OF TITLE. See LIMITATIONS, 1 to 5.

CONDITIONS.

OF A GRANT UPON CONDITION.

That the grantee shall not convey within a specified time—construction thereof. See GRANT, 1, 2.

CONFLICT OF LAWS.

JURISDICTION OF THE COURTS OF A STATE.

To restrain the performance of acts outside of the State. See JURISDICTION, 1, 2, 3.

OF A MARRIAGE IN ANOTHER COUNTRY.

Rights not affected by a subsequent removal to this State. See MARRIED WOMEN, 2, 3.

CONSIDERATION.

WHAT IS SUFFICIENT.

1. *For an agreement to extend time of payment.* H and wife executed to P a chattel mortgage upon four horses, two sets of harness and a wagon, to secure a note for $300, given by H to P. Before the mortgage matured, the mortgagor let P have one pair of the horses to apply thereon at $280, the price being $300, a deduction of $20 from the price being made in consideration of an agreement by P to extend the time of the payment of the balance of the debt from two to three months. Before the expiration of two months after the maturity of the mortgage, P took possession of the other span of horses, harness and a wagon, and thereupon, the wife of H tendered to P the balance due upon the debt, and demanded a return of the property, which was refused. *Held*, in an action of trover, brought by the wife against P, that the agreement to extend the time of payment of the mortgage, was for a valuable consideration, and was binding upon the parties. *Pierce* v. *Hasbrouck*, 23.

2. *Transfer of bill of exchange.* Where the acceptor of a bill of exchange has discounted the bill before its maturity, and afterwards re-issues it, and the party to whom the bill is re-issued takes the same on account of indebtedness of the acceptor to him, such indebtedness constitutes a sufficient consideration to support the transfer. *Rogers* v. *Gallagher*, 182.

CONSOLIDATION OF ACTIONS.

IN EJECTMENT. See EJECTMENT, 4, 5, 6.

CONSOLIDATION OF RAILROADS. See RAILROADS, 1 to 6.

CONSTITUTIONAL LAW.

OF THE RULE OF CONSTRUCTION.

1. The presumption is, that every law passed by the legislature is in conformity with the constitution, unless the contrary be shown; and it must be a clear and palpable case, before the court will undertake to decide an act of a co-ordinate department of the government was beyond their constitutional competency to enact. *McVeagh* v. *City of Chicago*, 318.

CONSTITUTIONAL LAW. *Continued.*

LEGALIZING IRREGULAR ORGANIZATION OF CORPORATION.

Power of the legislature in that regard. See CORPORATIONS, 10.

TAXATION OF NATIONAL BANK SHARES.

Constitutionality of the act of June 13, 1867. See TAXES, 1 to 7.

OF PROPERTY OMITTED FROM TAXATION.

Power of the legislature to provide for its subsequent assessment. Same title, 8, 9.

MUNICIPAL TAXATION TO PAY SOLDIERS' BOUNTIES. See TAXES, 11, 12.

CONTRACTS.

CONTRACTS CONSTRUED.

1. *Whether certain additional services were embraced in a contract.* A contractor who had engaged to construct a piece of work, employed another, at certain stipulated wages, to superintend the construction, having previously requested the latter to make the plans and devise the best means by which certain difficult parts of the work could be accomplished. After his employment, the superintendent, at the request of his employer, applied these plans in the execution of the work, which was successfully done. *Held*, in an action against the contractor by his employee, to recover for the skill and labor bestowed in the making of those plans, that they were not embraced in the original contract of employment, nor in the duties thereby imposed, and he might recover additional compensation therefor. *Dull et al* v. *Bramhall*, 364.

2. *Whether joint or several.* A, the owner of a farm, rented it to B & C, for one-third of the corn raised upon it, and directed B to sell his rent corn for 25 cents per bushel. Afterwards B & C offered to sell to D between 5,000 and 6,000 bushels of corn, and D agreed with B to take 4,650 bushels at 25 cents per bushel, and pay $126 in hand, and B agreed to furnish feed lots and troughs for feeding and watering 100 head of cattle. D failed to pay the whole of the sum down, which he had agreed to, and B & C refused to deliver any more corn. Afterwards, through his intercession, B & C delivered more of the corn to D, but the quantity so delivered does not appear. Differences arose between B & C and D, concerning the amount claimed to be owing from D, whereupon A told D to pay B & C the sum they claimed, and that he, A, would go with D and measure the ground, and make the difference, if any, right, and thereupon D paid B & C's claim. D failed to meet A for the purpose of measuring the ground, as agreed, when A measured it, and found that it fell short 4½ acres of the estimate upon which D had paid B & C, and A, thereupon, offered to pay D the difference, which D refused, and brought suit on the original agreement between him and B & C, against all of the parties. *Held*, that A could not be considered as a party to,

CONTRACTS. CONTRACTS CONSTRUED. *Continued.*

or liable upon the original contract made with B & C; the proof showing, that A's interest in the corn was separate and distinct, and that B & C's authority to act for A in the matter, *only* intended to be a sale of his interest at a specified price; that A could only be held liable for the failure of B & C to deliver so much of his corn as they had sold for him and failed to deliver; B & C being *alone* liable for their failure to deliver their portion of the corn, and which liability of A would be several, and not joint; that A's agreement with D, that he would make any difference right which might appear, if D would pay B & C, did not render A an original party to the contract, but simply amounted to a new agreement, upon which A alone was liable, and not jointly with B & C. *Rankin et al.* v. *Taylor et al.* 451.

3. *Of contracts of insurance—their construction.* See INSURANCE, 1 to 10.

WHETHER PERFORMANCE WAIVED.

4. *By acts of one of the parties.* W made a written agreement with G, whereby he acknowledged himself indebted to G for the sum of $10,026.25, the purchase price of 229 head of cattle, and it was agreed, that W should ship to Chicago, without delay, 109 head, and sell them for the highest price, and after deducting expenses, apply the balance upon the debt to the extent of $6,000, and secure the balance of the purchase money. The cattle thus shipped were to be under the control of one H, subject to W's direction. Under this agreement, 107 head were shipped, but W refused to allow H to sell them at the price offered on their arrival. The market declined, and on the third day, G, through one M, purchased them from H for himself, and after paying expenses, gave to H, G's receipt for the balance of the proceeds on the sale. The next day, W, learning of the transaction, replevied the cattle, and placed them in the hands of A, who sold them for his use: *Held*, in an action of covenant brought by G against W, he having failed to pay over to G the proceeds of such sale, or secure the debt, that G was entitled to recover; that it was immaterial whether the act of G, in procuring the sale to be made to M, was proper or not, as such act in no wise released W from the performance of his covenant. Having sold the cattle, he was bound to pay over the proceeds to G, and secure the balance of the debt, according to his agreement. *Ware* v. *Gilmore*, 278.

ACCEPTING A PART BY A PURCHASER.

5. *Of his right to reject the residue which was not of the quality agreed upon.* See SALES, 2.

READINESS AND WILLINGNESS TO PERFORM.

6. *When it must be shown.* In an action upon a contract for non-delivery of articles contracted for, where the obligations to pay and

CONTRACTS. READINESS AND WILLINGNESS TO PERFORM. *Continued.*

deliver are concurrent, in order to recover, the plaintiff must aver and prove his readiness and willingness to perform his part of the contract. *Pahlman* v. *King, Admx.* 266.

7. *Slight proof sufficient.* And in such case, slight evidence of the fact will be sufficient, but some proof must be given. Ibid. 266.

PAROL CONTRACTS BY CORPORATIONS.

8. *Are binding.* The doctrine is well settled, that a corporation, acting within the scope of its legitimate authority, is bound by a parol contract made by its authorized agent, the same as an individual under like circumstances. *Racine & Mississippi Railroad Co.* v. *The Farmers' Loan & Trust Co. et al.* 331.

IN WHAT COUNTY A CONTRACT IS MADE.

9. A commission merchant doing business in Chicago, in Cook county, called upon a party in La Salle county, and requested him to consign grain to the former. The party in La Salle county did not reply definitely at the time, but subsequently consigned a shipment of grain to the commission merchant, at Chicago, advising him of the fact by letter, and in the same letter requested him to deposit a certain sum to the credit of the shipper's banker, which was done, but the sum so deposited exceeded the proceeds of the grain shipped, and to recover such excess the commission merchant brought suit in Cook county, against the shipper, and sent the summons to La Salle county for service: *Held*, that the contract out of which the cause of action arose, was made in La Salle county, and not in Cook county, and therefore the summons could not be sent to La Salle county to be served. *Shuler* v. *Pulsifer et al.* 262.

RESCISSION OF CONTRACTS.

10. *For fraud.* Where a party seeks to rescind a contract of exchange of horses, on the ground of fraud, he can only do so by offering to return the horse he received and demanding his own in return. *Ellington* v. *King*, 449.

11. *Power of an agent to rescind, does not follow from an authority to make a contract.* See AGENCY, 3.

CONTRACTOR.

OF EXPOSED EXCAVATIONS IN STREETS.

Liability of the corporation, although the work was being done by contract. See HIGHWAYS, 3.

NEGLIGENCE IN ERECTION OF BUILDINGS.

To what extent a contractor is liable—when acting under the direction of an architect. See NEGLIGENCE, 13 to 16.

CONTRIBUTION.

AS BETWEEN TENANTS IN COMMON.

Where one removes an incumbrance from the common estate—or buys in an outstanding title. See TENANTS IN COMMON, 1 to 4.

CONVEYANCES.

OF A GRANT UPON CONDITION.

That the grantee shall not convey within a specified time—construction thereof. See GRANT, 1, 2.

SHERIFF'S DEED.

Within what time it must be executed. See SHERIFF'S DEED, 1 to 4.

ACKNOWLEDGMENTS OF DEEDS. See that title.

CORPORATIONS.

ADMISSION OF CORPORATE EXISTENCE.

1. *What constitutes.* A note was executed to a railroad company, as a corporation, which was afterwards, and before its maturity, assigned by the company, through its president: *Held*, in an action upon such note by the assignee, against the maker, that the defendant, by executing his note to the company, thereby admitted its corporate existence, and in order to avoid its payment for the want of a party with whom to contract, he must prove that no such body existed in fact. *Mitchell et al.* v. *Deeds*, 417.

PLEA OF NUL TIEL CORPORATION.

2. *What is sufficient proof of a corporate existence.* See PLEADING AND EVIDENCE, 2.

PRESUMPTIVE EVIDENCE OF CORPORATE EXISTENCE.

3. *From a user.* A user of franchises raises the presumption, in a collateral proceeding, that a corporation is in the rightful exercise of such power. *Mitchell et al.* v. *Deeds*, 417.

POWERS OF OFFICERS OF A CORPORATION.

4. *And herein, of the appointment of agents.* A corporation may, unless otherwise provided by its charter, by resolution or by-law, appoint any person an agent, for the purpose of transferring or disposing of its property or negotiable securities. Ibid. 418.

5. No officer of the corporation possesses such exclusive power, unless conferred by charter. Ibid. 418.

6. And in the absence of both statutory authority and regulations of the corporate body, if the proof showed that the president was in the habit of exercising such power, then his authority so to act might be inferred. Ibid. 418.

7. The doctrine seems to be well settled, that the president of a corporate body may perform all acts which are incident to the execution

CORPORATIONS. POWERS OF OFFICERS OF A CORPORATION. *Continued.*

of the trust reposed in him, such as custom or necessity has imposed upon the office, and this without express authority. *Mitchell et al.* v. *Deeds*, 418.

8. And it is immaterial whether such authority exists by virtue of his office, or is imposed by the course of the business of the company. Ibid. 418.

9. In an action upon a promissory note, which was executed to a railroad company, and assigned by their president to the plaintiff, it can not be objected by the defendant, that the assignment of such note by the president was without authority, the proof showing, that by a resolution of the board of directors, adopted prior to the assignment, the president was authorized to pay off any debts owing by the company, in any securities or other property of the corporation, and there being no evidence that it was assigned by him to plaintiff for any other purpose than that expressed in such resolution. Ibid. 418.

IRREGULAR ORGANIZATION.

10. *Subsequent legislation.* The legislature have the same power to ratify and confirm an irregularly organized corporate body that they have to create a new one. Ibid. 418.

PRESIDENT OF A CORPORATION.

11. *Presumption as to his authority.* Where an instrument undertaking for the delivery of personal property, on the order of a bank, was assigned by its president, the authority to make such transfer will be presumed, in the absence of proof to the contrary. *Moser et al.* v. *Kreigh et al.* 84.

PAROL CONTRACTS BY CORPORATIONS.

12. *Are binding.* See CONTRACTS, 8.

MUNICIPAL CORPORATIONS.

13. *Liability in respect to the safe condition of streets, and herein, how that liability is affected by the work being done by contract.* See HIGHWAYS, 1 to 4.

14. *Neglect to repair streets—liability for injury resulting therefrom.* See HIGHWAYS, 5.

15. *Whether vindictive damages are recoverable against them.* See MEASURE OF DAMAGES, 7, 8.

COSTS.

COSTS IN CHANCERY.

1. *At what stage of the cause they may be awarded.* Where, in a suit in chancery to foreclose a mortgage, a decree is rendered which settles the rights of the parties and directs a sale of the premises, but leaves the question of costs undisposed of, and the whole case stands over to

COSTS. Costs in chancery. *Continued.*

await the report of the master, the parties being retained in court in view of further probable action in the case, it is competent for the court to require the costs to be taxed at the term subsequent to that at which such decree is rendered. *Northern Illinois R. R. Co.* v. *Racine & Miss. R. R. Co.* 356.

2. *Award of costs in chancery—discretionary.* The awarding of costs in chancery cases, is a matter of discretion with the court, which this court will rarely interfere with. Ibid. 356.

COUNTIES.

Liability under the pauper act.

For medical aid to persons falling sick, who are not paupers. See PAUPERS, 1, 2, 3.

CRIMINAL LAW.

Assault with a deadly weapon.

1. *Of the indictment.* An indictment for an assault with a deadly weapon, with intent to do a bodily injury, must aver, either that no considerable provocation appeared, or that the circumstances of the assault showed an abandoned and malignant heart. These are the elements which constitute the offense, and if not found in the indictment, it would be defective. *Baker* v. *The People*, 308.

Accessories—before and after the fact.

2. Under our statute, the distinction between accessories *before* the fact and principals, is abolished, but this is not true as to accessories *after* the fact. *Yoe* v. *The People*, 410.

3. Under our criminal code a party may be convicted as an accessory after the fact, and punished accordingly, though indicted as a principal. Ibid. 410.

Explanatory proof.

4. *To be favorably considered.* Where a party charged with crime can give an explanation of circumstances proved against him, showing them to be consistent with his innocence of the charge made, the jury ought to consider those circumstances favorably, and the court, on the request of the accused, should so inform the jury. Ibid. 414.

Evidence in criminal cases. See EVIDENCE, 20, 21, 22.

Practice in criminal cases. See PRACTICE.

CROSS BILLS. See CHANCERY, 7, 8, 9.

CROSS ERRORS. See PRACTICE IN THE SUPREME COURT, 4.

DAMAGES.

EXCESSIVE DAMAGES. See NEW TRIALS, 9 to 12.

VINDICTIVE DAMAGES.

When recoverable, and when not—generally. See MEASURE OF DAMAGES, 6.

Whether recoverable against a municipal corporation. Same title, 7, 8.

ASSESSMENT OF DAMAGES.

By the clerk—when allowable. See ASSESSMENT OF DAMAGES, 1.

DEATH.

OF PROOF THEREOF.

1. *By reputation.* The ordinary rule is, that it is general reputation among the kindred only of a deceased person that is admissible in proof of death, but this rule has been relaxed in cases where the deceased left no kindred that are known, and in such cases, reputation among the acquaintances of the deceased is sufficient proof of the fact. *Ringhouse* v. *Keever*, 470.

DEEDS.

ACKNOWLEDGMENTS OF DEEDS. See that title.

DELIVERY.

DELIVERY OF PERSONAL PROPERTY.

What constitutes. See SALES, 1.

DEMAND.

IN SUIT AGAINST AN ADMINISTRATOR.

1. *On contract made with the intestate.* In an action against an administratrix to recover for the breach of a contract alleged to have been made with the intestate, in his lifetime, by which the latter was to deliver to the plaintiff a certain quantity of coal at a specified price, and where the contract alleged to have been made, so far as plaintiff was concerned, rested entirely in parol, it is necessary for the plaintiff to show not only a readiness and willingness to perform his part of the contract, but a demand on the defendant for the property contracted to be delivered. *Pahlman* v. *King, Admx.* 266.

DISCRETIONARY.

WHAT MATTERS ARE DISCRETIONARY.

Keeping streets of a city in repair—how far discretionary. See HIGHWAYS, 5.

Award of costs in chancery—discretionary. See COSTS, 2.

DOWER.

WHEN THE RIGHT EXISTS.

1. Where a party dies intestate, leaving no lineal descendants, his widow will take one-half his lands in fee, as his heir, and dower in the other half. The case of *Lessley* v. *Lessley*, 44 Ill. 527, applied only to testate estates, and does not affect the rule as to dower, as here asserted. *Ringhouse* v. *Keever*, 470.

2. *Extent of the right.* But where the widow claims one-half the land in fee, as heir, her dower interest attaches only to the remaining half which descends to the other heirs; she cannot take one-half in fee and a dower right in so much of the other half as would be equal to one-third of the whole. Ibid. 470.

OF PROPERTY HELD IN TRUST.

3. *Whether it becomes real or personal property, and whether subject to dower in favor of a widow of one of the cestuis que trust.* See REAL AND PERSONAL PROPERTY, 1, 2, 3.

OF THE REMEDY.

4. *When in chancery—not by ejectment.* Where a widow claims one undivided half in fee, of the lands of which her husband died seized, as his heir, and dower in the other undivided half, the action of ejectment does not furnish an appropriate remedy. Her right to dower should, in such cases, be asserted by bill in chancery. *Ringhouse* v. *Keever*, 470.

TO WHOM IT MAY BE RELEASED.

5. Dower may be released to the owner of the fee, or to a person in privity with the estate, who can not assert the dower right against the owner of the fee. Hence, a tenant of the freehold, an equitable owner, a purchaser from the owner of the fee, although his contract be unexecuted, or one who has warranted the title, may become a releasee of the dower right. *Chicago Dock Co.* v. *Kinzie*, 289.

6. One tenant in common may unquestionably receive a release from a dowress, and it will enure to the benefit of the estate, and not alone to his individual interest. Ibid. 289.

7. In a proceeding by the widow of K, against C, for an assignment of dower in certain premises, the proof showed that K, her husband, conveyed the property to J, but that, by this deed, there was no relinquishment of dower. Subsequently, J conveyed the premises to H, who gave his notes for the purchase price, secured by a deed of trust upon the premises. H made this purchase, and took a conveyance in his own name, under a verbal agreement with O, that O should make the first three payments, and that if H made the last payment, he should have one-fourth of the property, and if O made all the payments, he was to take the whole. O entered into possession of the premises, and made all the payments. When O had paid one-half of the purchase price, K and

DOWER. To whom it may be released. *Continued.*

wife conveyed the premises to him, by which deed petitioner released her right of dower in the same, and afterwards O and H conveyed the property to C. K died about eight years after this latter conveyance. *Held*, that O, at the time of the execution to him of the deed by K and the petitioner, held such an interest in the premises as enabled him to become the releasee of the dower right, and that such deed operated to bar petitioner's right to recover dower in the premises. *Chicago Dock Co.* v. *Kinzie*, 289.

8. *Former decisions.* In the cases of *Blain* v. *Harrison*, 11 Ill. 384, and *Summers* v. *Babb*, 13 ib. 483, the rule is too broadly stated, if it was intended to hold that the right of dower can only be released to the owner of the fee. Ibid. 289.

EJECTMENT.

Pleading—joinder of counts.

1. The 9th section of our Statute of Ejectment seems, by implication, to forbid the joinder of a count for dower with counts of a different character. *Ringhouse* v. *Keever*, 470.

2. At any rate, where the plaintiff, as the widow, claims one-half the premises in fee, as heir of her deceased husband, and joins a count for dower in the other half, the latter count should, upon motion by the defendant, be stricken out. Ibid. 470.

Recovery of dower.

3. *In this action—when not allowable.* Where the widow claims one undivided half in fee, and dower in the other undivided half, the action of ejectment does not furnish an appropriate remedy. Her right of dower should, in such cases, be asserted by bill in chancery. Ibid. 470.

Consolidation of actions.

4. *And of requiring the plaintiffs in several actions to elect which they will prosecute.* H and W brought two separate actions in ejectment, against the same defendant, at the same term of court, for the same land, and by different attorneys; but both cases were docketed as one suit; the plea was so entitled and filed, and the docket entries showed that it was so treated by the parties. Upon the trial, after hearing the evidence, on motion of the defendant, the court required the plaintiffs to elect upon which declaration they would proceed, whereupon they elected to proceed in favor of H, and a judgment was rendered in favor of the defendant: *Held*, that W having failed to establish a right to recover, the action of the court requiring such election was not error, it operating merely as though the court had rendered a judgment against him, which could have been properly done. *Hardin et al.* v. *Kirk*, 153.

EJECTMENT. CONSOLIDATION OF ACTIONS. *Continued.*

5. But had W shown a right of recovery, such action of the court would have been error. Both cases having been treated as one suit, and the proofs heard, the defendant's objection came too late. *Hardin et al.* v. *Kirk*, 153.

6. *Construction of the ninth section of the ejectment act.* Under the ninth section of the ejectment act, parties may sue jointly, and proceed jointly in one count for the land, and each separately in other counts, and either for the whole, a part, or for separate and undivided interests, but parties can not bring separate actions, as in this case, and be required to consolidate them, without their consent. Ibid. 153.

ALLEGATIONS AND PROOFS.

7. *As to extent of recovery.* This court has repeatedly held, that under a declaration in ejectment for the entire premises, an undivided interest less than the whole can not be recovered. And in such case, where the whole premises are claimed by the plaintiff, a deed conveying a less interest is inadmissible. Ibid. 154.

8. The twenty-fourth section of the ejectment act, does not apply in cases where the whole premises are claimed, and is not repugnant to the seventh section of that law. Ibid. 154.

EQUALIZING ASSESSMENTS. See TAXES, 18.

ERROR.

THE GRANTING OF A NEW TRIAL.

Can not be assigned for error. *Weaver* v. *Crocker*, 461.

ERROR WILL NOT ALWAYS REVERSE. See PRACTICE IN THE SUPREME COURT, 8 to 12.

EVIDENCE.

PAROL EVIDENCE.

1. *Proving contents of a written calculation of accounts.* Where, upon a settlement made between parties, a paper was produced by one of them, purporting to contain a statement of the amounts of the accounts and the calculations in such settlement, and was shown to a third party then present, with the request that he should inspect it and see if the calculations had been properly made, which he did: *Held*, in a suit between the parties to such settlement, wherein an item contained in such paper was in dispute, that the party to whom such paper was shown might be permitted to testify as to his memory concerning the calculations of the amounts contained therein, without the production of such instrument; that it does not come within the rule in regard to proving the contents of written instruments. *Weaver* v. *Crocker*, 461.

VIDENCE. PAROL EVIDENCE. *Continued.*

2. *To explain a receipt.* A receipt which, on its face, purports to be, and is, the contract of the parties, can not be explained or varied by parol evidence; but such portion of it as merely goes to the receipt of the money, may be explained by showing no money was, in fact, paid. *O'Brien* v. *Palmer*, 72.

3. So, where, in a bill of sale of certain property, the purchase price was stated to be $10,000, with the words, "Received payment in full:" *Held*, that parol evidence was admissible to show that no money, in fact, was paid. Ibid. 72.

4. *To contradict a receipt in an insurance policy, as to the premium—not allowable.* See INSURANCE, 7.

ADMISSIBILITY, GENERALLY.

5. Where, on the second trial of an action of replevin, the plaintiff, to prove his title to the property in controversy, introduced in evidence a bill of sale purporting to have been made to him by the purchaser of such property at a mortgage sale thereof: *Held*, that it was proper for the defendant to show that such bill of sale was not introduced in evidence on the former trial, and thereby place the plaintiff in a situation requiring an explanation of why he failed to produce it. *Hanford* v. *Obrecht*, 146.

IN TRESPASS FOR AN ASSAULT AND BATTERY.

6. In an action of trespass for an assault and battery, it is not competent for the plaintiff to prove that he had employed counsel to attend to his suit, and had himself lost time in attending to the case. *Kelsey* v. *Henry*, 488.

DECLARATIONS.

7. *Out of the presence of the party to be affected.* In a suit by a married woman, respecting personal property claimed by her, it is proper to exclude declarations made by her husband when she was not present, in which he asserted his ownership over the property. The rights of the wife could not be prejudiced by his declarations not made in her presence. *Pierce* v. *Hasbrouck*, 27.

ADMISSIONS.

8. *Of the weight they are entitled to.* Admissions of guilt, by a party charged with crime, may be weak, or the strongest kind of evidence. Of the latter, when the party making them has full knowledge of all the facts. *Yoe* v. *The People*, 411.

9. *Admission of a corporate existence, by executing a note to the corporation.* See CORPORATIONS, 1.

EVIDENCE. *Continued.*

BURDEN OF PROOF.

10. *General rule.* As a general rule, subject, it may be, to a few exceptions, the party who holds the affirmative of an issue, is held to its proof. *Mitchell et al.* v. *Deeds*, 417.

11. *Under plea of want or failure of consideration.* This court has said, that under the tenth section of the statute regulating negotiable instruments, where a want or failure of consideration is pleaded, it must be proved by the party alleging it. Ibid. 417.

12. *Of notice to an assignee before maturity.* So, in an action upon a promissory note, brought by an assignee before maturity, where the defendant sets up a defense, and that the plaintiff had notice thereof before he received the assignment, the burden of proof in regard to the question of notice is upon the defendant who alleges it. Ibid. 417.

13. *As to disposition of money by an executor.* In a suit in chancery on an executor's bond, by the devisees, for an alleged misappropriation of the moneys belonging to the estate, where the defendant claims that such moneys were paid over by the executor to complainants, it is incumbent on him to satisfactorily establish such fact, the money having been in the hands of the executor, as proved by his report to the court. *Johnston* v. *Maples et al.* 102.

SUFFICIENCY OF PROOF.

14. *In an action against a railway company for stock killed*, where there is no positive proof that the defendants operated the railway which it is claimed committed the injury, but such fact is inferentially shown by the fact, the defendant was incorporated by the name it bears, at a session of the legislature next previous to the injury complained of—under such circumstances, the inference is, that such injury was done by the defendants' road, there being no proof that any other road was operated in that portion of the county where the damage was done. *Toledo, Peoria & Warsaw Railway Co.* v. *Arnold*, 178.

PROOF THAT A WOMAN IS UNMARRIED.

15. *In a proceeding for bastardy—what is sufficient proof that the complaining witness is unmarried.* See BASTARDY, 1.

EVIDENCE OF NEGLIGENCE.

16. *Explosion of steam boiler—prima facie evidence of defective material.* See NEGLIGENCE, 3.

PROOF OF A CORPORATE EXISTENCE.

17. *When sufficient.* See CORPORATIONS, 1, 3; PLEADING AND EVIDENCE, 2.

EVIDENCE. *Continued.*

WHETHER A NOTE WAS ASSIGNED BEFORE OR AFTER MATURITY.

18. *Presumptive evidence.* In an action upon a promissory note by an assignee, where the payee, who was a witness upon the trial of the suit, fails to state that the note had been endorsed before maturity, and the defendant in the proceeding neglects to inquire of such witness whether the note had been transferred before it became due, the jury, under such circumstances, are warranted in finding that it had not been so endorsed. *Snider* v. *Ridgeway*, 523.

EVIDENCE OF OWNERSHIP.

19. *As between two mortgagors—not material to the mortgagee.* Where two persons join in the execution of a chattel mortgage, the rights of the mortgagee under the mortgage can not be affected by any question of ownership between the two mortgagors; therefore, in a suit by one of the mortgagors against the mortgagee, in respect to the property, the defendant can not raise the question whether the claim of title by the plaintiff is in fraud of the creditors of the other mortgagor. *Pierce* v. *Hasbrouck*, 26.

EVIDENCE IN CRIMINAL CASES.

20. *Of the right to show the character of a witness—in a capital case.* Where, upon the trial of a capital case, a witness, who had acted as a detective, was asked the question by the prisoner's counsel, upon cross-examination, "What is the character of your associates, in your business as a detective?" *Held*, that the inquiry was objectionable, as tending to degenerate into investigations wholly foreign to the matters in question. *Yoe* v. *The People*, 410.

21. *Reading medical books to a jury.* On the trial of a party upon a charge of murder, alleged to have been committed by means of poison, where the State's attorney, in his argument to the jury, read from medical books not in evidence, or proved to be authority upon the subject, it was the duty of the court to instruct the jury that such books were not evidence, but theories, simply, of medical men. Ibid. 410.

22. *Testimony given in another case—in another State—inadmissible.* It was error for the court to permit to be used in evidence against the prisoner the testimony of a professor of chemistry, given in another case and in another State, and reported in the Criminal Reports, no opportunity having been had either to cross-examine such witness or to meet his testimony by other evidence. Ibid. 410.

PROOF OF FRAUD.

Of the manner thereof. See FRAUD, 5.

Presumptive evidence of fraud—where a note secured by mortgage is in possession of mortgagor. See FRAUD, 6.

EVIDENCE. *Continued.*

OF STAMPING INSTRUMENTS.

Not essential to their admissibility in evidence. See STAMP ACT, 1.

EXCEPTIONS AND BILLS OF EXCEPTIONS.

BILL OF EXCEPTIONS.

1. *When necessary.* Where the action of the circuit court upon a motion to remove a cause from the State to the Federal court, is assigned for error, such motion only becomes a part of the record, and is properly before the court for review, by means of a bill of exceptions. *Hartford Fire Ins. Co.* v. *Vanduzor*, 489.

PRESUMPTION.

2. *Whether exception was taken in proper time.* Where an exception to an instruction appears in regular order upon the record, immediately following the instruction excepted to, this court will presume that such exception was taken at the time the instruction was given. *Strickfaden* v. *Zipprick*, 286.

EXCESSIVE DAMAGES. See NEW TRIALS, 9 to 12.

EXECUTORS. See ADMINISTRATION OF ESTATES, 1, 2.

FACTOR.

OF HIS DUTY AS TO INSURANCE.

1. *Of goods consigned to him.* The doctrine is well settled, that a factor for hire is not obliged to effect insurance on the property consigned to him, without some authority, express or implied, from his principal. *Shaeffer* v. *Kirk et al.* 251.

FORFEITURE.

NOT FAVORED.

1. The law does not favor forfeitures, but refuses to enforce them, whenever wrong or injustice will result therefrom; and before a forfeiture will be enforced, a clear case, appealing to the principles of justice, must be established. *Voris et al.* v. *Renshaw*, 426.

2. So, a condition to avoid an estate must be taken strictly. It can not be extended beyond its express terms; and when a party insists upon the forfeiture of an estate under a condition, he must bring himself clearly within its terms. Ibid. 426. See GRANT, 1, 2.

FORMER DECISIONS.

MASTERS' SALES.

1. *Of reporting biddings to the court.* The practice is, if the decree of the court does not otherwise direct, to strike the property off to the highest bidder, and it has not been usual to report bids to the court.

FORMER DECISIONS. MASTERS' SALES. *Continued.*

If the bidder complies with all the terms of the sale, it is not usual for the court to refuse to confirm the sale, unless fraud, accident, mistake, or some great irregularity, calculated to do injury, has occurred. The case of *Dills* v. *Jasper*, 33 Ill. 262, is not considered in harmony with previous decisions of this court, or with the practice in this State on this subject. *Comstock et al.* v. *Purple et al.* 159.

MEASURE OF DAMAGES.

2. *In an action by a tenant against his landlord.* It is held, in an action by a tenant against his landlord for damages resulting from the cutting off the steam power to which the tenant was entitled under his lease, and which he was using in the prosecution of his business, the probable profits of the business may be considered in ascertaining the damages; and this is not considered in conflict with *Green* v. *Williams*, 45 Ill. 206, as in that case the lessee had not entered upon the term—had not built up a business to be injured. *Chapman et al.* v. *Kirby*, 219.

DOWER—WHEN WIDOW TAKES ONE-HALF IN FEE.

3. The case of *Lessley* v. *Lessley*, 44 Ill. 527, applied only to testate estates, and was not intended to overrule the previous decisions, holding that, in cases of intestacy, the widow is entitled to one-half the realty in fee, and dower in the other half, where there are no lineal descendants. *Ringhouse* v. *Keever*, 470.

RELEASE OF DOWER—TO WHOM.

4. The rule is too broadly stated in *Blain* v. *Harrison*, 11 Ill. 384, and *Summers* v. *Babb*, 13 Ill. 483, if it was intended to hold that the right of dower can only be released to the owner of the fee. If it was intended to hold that it might be released so as to unite with the fee, or those holding under the same title and in privity with the fee, then it is correct. *Chicago Dock Co.* v. *Kinzie*, 294. See DOWER, 5 to 8.

FRAUD.

WHAT CONSTITUTES FRAUD.

1. Where the heirs of an estate, finding themselves clothed with the legal title to real estate, and without any knowledge of an outstanding equity, as that their ancestor obtained the land by fraud, file their petition for partition, the mere allegation in their petition that they were the owners of the property, does not amount to fraud on their part, so as to enable a purchaser under a decree of sale to avoid his liability for the purchase money. Fraud consists in the willful allegation of a falsehood, for the purpose of deception. *McManus* v. *Keith et al.* 390.

2. To constitute fraud, there must be a willful, false representation of facts, or the suppression of such facts as honesty and good faith require should be disclosed. *Mitchell et al.* v. *Deeds*, 417.

FRAUD. What constitutes fraud. *Continued.*

3. *False representations.* In an action upon a promissory note executed to a railroad corporation, claimed to consist of several companies consolidated, the defendant set up, as a defense, that the note was procured from him by the company, by means of false and fraudulent representations, made by its officers, to the effect that these companies had *legally* consolidated, and the proof showed that articles of consolidation between the parties had been drawn up and signed, and officers of this new organization had been elected, and had entered upon the discharge of their duties: *Held*, that this was sufficient to repel the presumption of false representation that the companies had *legally* consolidated, unless the persons making them knew that the consolidation was illegal and unauthorized. *Mitchell et al.* v. *Deeds*, 417.

Proof of fraud.

4. *Necessity thereof—false representations.* In an action upon such a note, where the defendant also having set up, as a defense, that he was induced to execute the same, by means of false and fraudulent representations, made to him by the officers of the company, concerning its solvency, and the progress of its road to completion, he must prove it, otherwise he must fail on this issue. Where fraudulent representations are relied upon as a defense, they must be established like any other fraud. Ibid. 417.

In what manner proven.

5. It is not the rule that fraud must be shown by affirmative testimony. Proof of such fact may be shown by circumstances, from the existence of which, the inference of fraud is natural and irresistible. *Bullock* v. *Narrott*, 62.

Presumptive evidence of fraud.

6. *Evidence of a debt secured by mortgage should remain with the mortgagee.* Where a party executed and delivered to another a chattel mortgage upon certain property, which was duly recorded, and shortly after died, and in an action of replevin for the mortgaged property, which had been taken upon execution, subsequently brought by the mortgagee, it was shown, that at the time of the mortgagor's death, he had in his possession the note for which the mortgage was given as security: *Held*, that this fact was a strong circumstance against the *bona fides* and honesty of the mortgage transaction, the presumption being, either that the note had never been delivered, or had been paid and taken up; and this, no matter how honest the transaction may have been. Ibid. 62.

Who may raise the question of fraud.

7. *Of a party not affected thereby.* Where husband and wife join in the execution of a chattel mortgage to secure a debt owing by the

FRAUD. WHO MAY RAISE THE QUESTION OF FRAUD. *Continued.*

former, and upon the mortgagee's taking possession of the property, the wife institutes an action of trover against him, claiming the property as her own, and that the mortgagee took the same before his right thereto accrued, the mortgagee can not raise the question whether the plaintiff's claim of title was in fraud of her husband's creditors. His rights under the mortgage were unaffected by any question of ownership as between the two mortgagors. *Pierce* v. *Hasbrouck*, 26. See, also, TRUSTS AND TRUSTEES.

AS BETWEEN PRINCIPAL AND AGENT.

Concealment of facts by the latter. See AGENCY, 4.

OF A TITLE FRAUDULENTLY OBTAINED.

Held in trust for the rightful owner. See TRUSTS AND TRUSTEES, 3.

CHATTEL MORTGAGES.

Possession by mortgagor, after default—whether fraudulent. See MORTGAGES, 3, 4.

FRAUDS, STATUTE OF. See STATUTE OF FRAUDS.

GARNISHMENT.

NOTE PAYABLE TO WIFE OF DEBTOR.

1. *Whether subject to garnishment.* Where a promissory note, made payable to the wife, belongs to her husband, such note, after its maturity, is liable to the process of garnishment issued by a judgment creditor of the husband. *Snider* v. *Ridgeway*, 522.

PROCEEDING BEFORE MATURITY OF DEBT.

2. It is no objection that proceedings in garnishment, to reach indebtedness on a promissory note, were instituted before the maturity of the note, provided judgment is not rendered until after it falls due. Ibid. 522.

GRANT.

GRANT UPON CONDITION.

1. *Of a deed containing condition against a conveyance within a limited period—construction thereof.* Where the grantor in a deed annexed to the grant a condition that the grantee should not convey the property, except by lease for a term of years, prior to a certain day named therein, and the grantee afterwards, and within the limited period, executed to a party a lease of the premises for 99 years, and also, at the same time, gave to him a bond for the conveyance of the property in fee, after the expiration of the limitation, and received from the purchaser the purchase price therefor: *Held*, that these acts of the grantee

GRANT. GRANT UPON CONDITION. *Continued.*

were not prohibited by the condition, and hence worked no forfeiture of the estate. *Voris et al.* v. *Renshaw*, 425.

2. *Condition to avoid an estate—construed strictly.* A condition to avoid an estate must be taken strictly. It cannot be extended beyond its express terms. And when a party insists upon the forfeiture of an estate under a condition, he must bring himself clearly within its terms. Ibid. 425.

GUARDIAN AND WARD.

APPLICATION OF WARD'S MONEY.

1. *Guardian alone responsible.* In an action of debt against M, upon his bond as guardian, it appeared in proof that M made a settlement of his guardian's account with the probate court, and that upon such settlement, M, by order of the court, executed to A, who was appointed his successor, a note for the amount found to be owing by him, and was thereupon discharged; that M afterward paid A a portion of said note in money, and at A's request made a payment for lumber to the extent of the balance of the note, and which lumber A used in improving the real estate of the wards. On the trial, the court below refused to allow M credit for the money paid for the lumber. *Held*, that this was erroneous; that the payment for the lumber amounted to the same as a payment in money, and should have been allowed as a credit. *Mortimer et al.* v. *The People, for the use of Wells*, 473.

2. A guardian may receive his ward's money, and when received, he is responsible for its application. If he misapplies it, no new liability is created against the parties from whom it was received, as it is no part of their duty to see that the guardian faithfully applies it. Ibid. 473.

HIGHWAYS.

SAFE CONDITION OF STREETS.

1. *Duty and liability of cities, in that regard.* Corporations, like individuals, are required to execute their rights and powers with such precautions as shall not subject others to injury. *City of Springfield* v. *LeClaire*, 476.

2. Where the duty is imposed by law upon a municipal corporation, to keep its streets in a safe condition for use by the public, an action on the case will lie against it for damages arising from a neglect of such duty. Ibid. 476.

3. And in such case, the duty being imposed upon the corporation, it can not be shifted to a person who had been employed to perform it, and if an injury results from neglect of such duty, the corporation must be held liable for the damage. Ibid. 476.

HIGHWAYS. SAFE CONDITION OF STREETS. *Continued.*

4. In an action against a municipal corporation, for injuries alleged to have been sustained by the plaintiff from falling into a sewer, which, under a contract with the corporation, was in process of construction in one of the public streets, the defendant filed two special pleas, by the first of which, liability was sought to be thrown on the contractor who was engaged in the work, and the second plea was based upon a clause in the charter of the city, to the effect that it should not be held liable for any damages arising from the bad condition of its streets, from neglect to *repair* the same, until a certain officer should have been notified thereof, and failed to repair the same within a reasonable time after such notice. A demurrer was sustained to these pleas, and judgment rendered thereon: *Held*, that this action of the court was proper—neither of the pleas presenting any defense to the action; that this provision in the charter had no application to the case stated in the declaration. The injury complained of was not the result of *defective* streets, but in permitting the sewer to be constructed in a manner dangerous to the public safety. *City of Springfield* v. *LeClaire*, 476.

OF KEEPING STREETS IN REPAIR.

5. *Duty and liability of cities in that regard.* Municipal corporations have a discretion as to the time when repairs, in streets not much used by the public, and not in the business part of the city, shall be made; and if a personal injury is sustained by a person, by reason of a defect in any such street, the corporation can not be held guilty of gross negligence, in an action for such injury, and subjected to exemplary damages, for the mere failure to make necessary repairs. *City of Chicago* v. *Martin et ux.* 241.

HOMESTEAD.

ABANDONMENT.

1. *What constitutes—by a widow.* B and wife executed to C a conveyance of their homestead, but the deed did not operate to release the homestead right. B continued in the occupancy of the premises after the execution of the deed, under a lease from C, and paid rent therefor. Subsequently B died, leaving a widow and one child, who remained in possession for a time, when the widow intermarried with one M and removed to another town, taking the child with her, and leased the premises to A, appropriating the rents to the education of the child: *Held*, in an action of ejectment brought by C against A, that the homestead right was lost by act of B's widow in abandoning the possession, and that C was entitled to a recovery. *Buck* v. *Conlogue*, 391.

2. By the mere act of B in taking a lease of the premises from C after the conveyance, and paying rent therefor, no forfeiture was incurred of the right to assert the homestead exemption, either on the

HOMESTEAD. ABANDONMENT. *Continued.*

part of B in his lifetime, or his widow and child after his death, while they continued to occupy the homestead. Ibid. 391.

3. But B's widow, by her intermarriage with M, and removal with her child to a different town and taking up her residence upon premises owned by her husband, acquired a new home, and by its acquisition lost the right of homestead in the premises. *Buck* v. *Conlogue*, 391.

4. In such cases, the proof of an intention on the part of the claimant to return and occupy the homestead, must be clear and satisfactory, in order to preserve the right. Ibid. 391.

5. *Abandonment by the widow—deprives the children of the right.* After the death of B his widow became the head of the family, and by her marriage, and abandonment of the homestead, the child also lost the right to claim the statutory privilege as completely as if the abandonment had occurred during the life of B and by his act. Ibid. 391.

HUSBAND AND WIFE.

AS WITNESSES FOR OR AGAINST EACH OTHER. See WITNESSES, 2, 3.

OF A NOTE PAYABLE TO THE WIFE.

To whom it belongs, and who may assign the same. See MARRIED WOMEN, 4 to 7.

ILLINOIS AND MICHIGAN CANAL.

ACTION FOR NEGLIGENCE IN RESPECT THERETO.

Against whom it will lie. See PARTIES, 3.

IMPLIED WARRANTY. See WARRANTY, 1.

INCUMBRANCES.

AS BETWEEN TENANTS IN COMMON.

Of their apportionment—in a suit for partition. See PARTITION, 1.

INFANTS.

OF CONTRACTS FOR IMPROVEMENTS.

1. *Not binding, and no lien created.* Where work is done, or materials furnished, under a contract made with a minor, for the improvement of his property, such contract is not binding, and the contractor can claim no lien therefor against the property. *McCarty et al.* v. *Carter*, 53.

2. A party performing work, or furnishing materials for the improvement of property, must ascertain whether the party with whom he is contracting is a minor or not, and if such contract is with one who has not attained his majority, it is not obligatory upon him, and the lien of the contractor fails. Ibid. 53.

INFANTS. *Continued.*

RATIFICATION AFTER MAJORITY.

3. *What constitutes.* And where improvements are made under such a contract, the receipt of rents, after he becomes of age, from the property so improved, does not amount to a ratification, so as to operate as a lien against his property. *McCarty et al.* v. *Carter*, 53.

FURNISHING NECESSARIES TO MINORS BY EXECUTORS.

Of the power in that regard. See ADMINISTRATION OF ESTATES, 2.

INJUNCTIONS.

WHEN AN INJUNCTION WILL LIE.

1. *When a railroad company refuses to deliver grain at the proper warehouse.* Where a railroad company refuses to deliver grain at the warehouse to which it is consigned, as required by the act of 1867 on that subject, the party injured is not confined to the statutory redress; the right created not being a new one, nor the remedy provided adequate, he may resort to the restraining powers of a court of chancery, to prevent an injury to his business which might ensue, and which could not be compensated for at law. *Vincent et al.* v. *Chicago & Alton Railroad Co.* 33.

AS TO PERSONS AND ACTS IN OTHER STATES.

2. *Of the jurisdiction of the courts of this State.* See JURISDICTION, 1, 2, 3.

INJUNCTION BONDS.

3. *In cases to enjoin collection of a note—bond may provide for payment of the debt.* In a suit to enjoin the collection of a promissory note, the statute prescribes no rule in regard to the conditions to be inserted in the injunction bond, and in such cases the judge or master granting the writ may require a complainant to give security for the payment of the note, in the event he fails to maintain his suit. *Billings* v. *Sprague*, 509.

DAMAGES ON DISSOLUTION.

4. *When suggestions in writing not necessary—construction of act of* 1861. In cases where an injunction has issued to restrain the collection of a judgment at law, it is not necessary that suggestions in writing should be filed as required by the act of February, 1861, before awarding damages upon dissolution of the injunction. Such case is within the act of 1845, and by that alone governed. *Shaffer* v. *Sutton*, 506.

5. The act of February, 1861, on that subject, does not repeal the act of 1845, but was designed to provide for a class of cases not embraced within the last named act, among which an injunction to enjoin the collection of a judgment at law is not included. Ibid. 506.

INSTRUCTIONS.

OF THEIR QUALITIES.

1. *Need not be repeated.* It is not error to refuse an instruction which, in substance, is but a mere repetition of instructions which were given. Instructions need not be repeated. *Ware* v. *Gilmore*, 278; *Baker* v. *Robinson*, 299.

2. Nor is it error to refuse to modify an instruction, when, by modification, the same principle already given would be repeated. Ibid. 278.

3. *Should be based upon the evidence.* It is not error to refuse an instruction which is not based upon the evidence. *Reno* v. *Wilson*, 95.

4. It is error for the court to give an instruction which is not based upon the evidence. *Hanford* v. *Obrecht*, 146; *Baker* v. *Robinson*, 299.

5. It is error for the court to give an instruction which presumes the existence of a fact, that the evidence does not show to exist. *Bullock* v. *Narrott*, 62.

6. *Should not leave questions of law to the jury.* The question, whether a mortgage had been properly executed and acknowledged, is one of law, to be passed upon by the court, and which it is error to leave to the decision of the jury. Ibid. 62.

7. *Should be germane to the issue.* It is not error for the court to refuse an instruction which is not germane to the issue. *O'Brien* v. *Palmer*, 72.

8. *Should be consistent.* It is the right of every party to insist that the law applicable to his case shall be fairly and distinctly stated in the instructions, and it is not sufficient that a part of the instructions contain a correct exposition of the law, if it is incorrectly announced in others. *Chicago, Burlington & Quincy R. R. Co.* v. *Payne, Admr.* 499.

9. Instructions given to a jury should announce the law of the case with accuracy and precision, and when taken together be consistent, in order that the jury may be aided, and not misled, in arriving at a verdict. Ibid. 499.

10. *As to the form of expression.* This court will not reverse a judgment merely because an instruction is not well expressed, and is awkward in construction, where its true meaning is apparent, and could not have been mistaken by the jury. *Pierce* v. *Hasbrouck*, 23.

11. *Naming a witness—and directing the attention of the jury to his conduct while testifying.* An instruction is not objectionable for the reason merely that it points out a witness by name, and directs the jury to take into consideration his conduct while testifying, as affecting his testimony. Where such an instruction is given, this court will presume that the manner of the witness justified and called for it. *Ammerman* v. *Teeter*, 400.

INSTRUCTIONS. *Continued.*

DEFECTIVE INSTRUCTION—CURED BY EVIDENCE.

12. In an action against a railroad company for killing stock, an instruction is not objectionable which fails to exclude *all* of the places excepted by the statute from being fenced, where it is apparent from the testimony that the injury did not occur in one of the excepted places, witnesses having been permitted to testify, *without objection*, that the injury happened at a place where the defendant was bound to fence its road. *Toledo, Peoria & Warsaw Railway Co.* v. *Parker et al.* 385.

QUESTIONS OF LAW AND FACT.

The former for the court, and the latter for the jury to decide. See PRACTICE, 13 to 17.

INSURANCE.

CONSTRUCTION OF POLICY.

1. *General rules.* The rules by which a policy of insurance is to be construed, and the principles by which it is to be governed, do not differ from other mercantile contracts. *Aurora Fire Ins. Co.* v. *Eddy*, 106.

2. But conditions and provisions in a policy of insurance are to be construed strictly against the underwriters. Ibid. 106.

AGREEMENT TO KEEP BUCKETS OF WATER IN THE BUILDING.

3. *Construction thereof.* Where a policy of insurance contained the following clause: "It is expressly agreed that the assured is to keep eight buckets filled with water, on the first floor, where the machinery is run, and four in the basement, by the reservoir, ready for use at all times, in case of fire:" *Held*, that this could not be considered either as a condition or proviso in the policy, but was an express agreement on the part of the assured, and which must be construed like other agreements. Ibid. 106.

4. The rule for the construction of such an agreement is, that while the assured will not be held to a literal compliance with the warranty, as, for instance, in keeping the buckets filled with water during the winter season, when no fires were allowed in the building, which might be impossible, and could not have been contemplated by the parties; yet it is, under such agreement, incumbent on the assured to keep the required number of buckets in good and serviceable condition, at the places designated, ready for instant use; a failure to do which, should a fire occur, would prevent a recovery upon the policy. Ibid. 106.

INSURANCE AGAINST DEATH BY ACCIDENTS.

5. *Of the application—as showing the occupation of the assured—and as a restriction in that regard.* In an action on a policy of insurance, against death by accidents, the court refused to permit the defendant to

INSURANCE. Insurance against death by accidents. *Continued.*

give in evidence the application of the assured, showing, that at the time of the insurance, his occupation was that of a "switchman," and to prove in connection therewith, that the assured was killed while in the performance of the duties of a "brakesman:" *Held*, that this evidence was immaterial. That the mere representation by the assured, that he was a "switchman," did not amount to a contract that he would do no act not connected with such occupation, or that he would not engage in any different one. *Provident Life Insurance Co.* v. *Fennell*, 180.

6. *Of the character of accidents insured against.* In such case the defendant can not prohibit itself from liability, inasmuch as the policy was not against accidents occurring in the occupation of the assured, but against accidents generally, and enumerated the particular cases in which the company could not be held liable, but did not provide that it would not be liable for death occurring from a cause not connected with the occupation of the assured, or that he should not change his occupation. Ibid. 180.

Payment of premium.

7. *Receipt in policy conclusive.* Where a policy of insurance, acknowledges the receipt of the premium, proof that it had not been paid will not be permitted. Ibid. 180.

What property is covered by a policy.

8. *Upon a packing establishment.* The owners of a packing establishment obtained a policy which covered "cattle and hogs and the product of the same, and salt, cooperage, boxes, and articles used in packing, in their stone and frame packing establishment, sheds and yards adjoining, their own or held by them in trust or on commission, or sold but not delivered:" *Held*, that a quantity of coal in the yard, which was shown to be an article necessary to be used in carrying on the packing business, and the quantity on hand reasonable for the amount of business done in the packing establishment, was covered by the policy. *Phœnix Ins. Co.* v. *Favorite et al.* 259.

9. Nor did the use of the words in another policy, "articles used *for* packing," instead of "articles used *in* packing," affect the construction to be given to the instrument, in that regard. Ibid. 259.

10. Also, a quantity of barrels and tierces held by the assured on storage, were covered by the clause which embraced articles "held by them in trust or on commission," the term "trust" not having been used in that connection in any technical sense, but as applying to ordinary bailments. Ibid. 259.

Duty of a factor for hire.

As to insuring goods consigned to him. See FACTOR, 1.

INTEREST.

WHERE NO RATE IS AGREED UPON.

1. *At what rate recoverable.* In a contract for the payment of money, where no rate of interest is agreed upon, the legal rate is six per cent., and in an action upon such contract, it is error to render a judgment allowing a greater rate of interest. *Ford* v. *Hixon*, 142.

JUDGMENTS.

JUDGMENT ON PLEA IN ABATEMENT.

1. *When the plea is sustained.* Where a plea in abatement, traversing the affidavit upon which a proceeding by attachment is based, is sustained on the trial, the suit must abate. *Lawrence et al.* v. *Steadman et al.* 270.

2. So, where a suit by attachment was commenced against two, upon a joint indebtedness, and the affidavit set forth two distinct grounds for the attachment, one having application to one of the defendants alone, who filed his plea in abatement traversing that portion of the affidavit, and the other having reference to both defendants, which was traversed by plea filed by the other defendant, and upon trial the issues were found for the defendants: *Held*, the suit must abate. Ibid. 270.

3. Where the defendant in an action in which the summons was sent to a foreign county for service, pleads, in abatement, that the cause of action did not accrue, and was not specifically made payable, in the county in which the suit was instituted, and an issue is formed upon such plea, if the plaintiff fails to prove that the cause of action did accrue, or was specifically made payable, in the county from whence the writ issued, it is error to render a judgment in his favor. *Martin et al.* v. *Brewster et al.* 306.

ON FORECLOSURE BY SCIRE FACIAS.

4. *Form of the judgment.* The judgment in a proceeding by *scire facias* to foreclose a mortgage, found the amount due upon the mortgage, and directed, first, that the plaintiff recover of and from the defendant the sum so found to be due, and then awarded a special execution for a sale of the mortgaged premises. This was held to be a judgment *in rem* and not *in personam*. *Williams* v. *Ives*, 512.

SETTING ASIDE JUDGMENTS.

5. *After the term at which they are rendered.* The power of the court over its judgments, except to amend them in matters of form, or to correct clerical errors, is gone when the term at which they were rendered has expired. After that time, a court can not, on motion, set aside a judgment. *State Savings Institution* v. *Nelson*, 171.

SEALING A VERDICT—SEPARATION OF JURY.

When judgment may be entered. See PRACTICE, 10, 11.

JUDICIAL SALES. See SALES, 4 to 9.

JURISDICTION.

JURISDICTION OF COURTS OF THE STATE.

1. *In reference to persons in another State.* The jurisdiction of our courts is only co-extensive with the limits of our State. They can not legally send their process into other States and jurisdictions for service. *Western Union Telegraph Co.* v. *Pacific & Atlantic Telegraph Co.* 90.

2. Neither law nor comity between distinct State or national organizations, sanctions the authority of one such body to exercise jurisdiction over the citizens and their property, while both are beyond the jurisdiction of the tribunal in which the proceeding is pending. Ibid. 90.

3. So, the courts of this State can not restrain citizens of another State, who are beyond the limits of this State, from performing acts in another State, or elsewhere outside of, and beyond the boundary lines of this State. Ibid. 90.

PRESUMPTION.

4. *As to jurisdiction of the circuit courts.* The circuit courts are courts of general jurisdiction, and the presumption is in favor of their jurisdiction to hear and adjudicate all cases, until such presumption is rebutted. *Farmers & Merchants' Ins. Co.* v. *Buckles*, 482.

MODE OF QUESTIONING JURISDICTION.

Where process is sent to a foreign county. See ABATEMENT, 1, 2.

JURY.

QUESTIONS OF LAW AND FACT.

Generally. See PRACTICE, 13 to 17.

JUSTICE OF THE PEACE.

ALLEGATIONS AND PROOFS.

1. *Need not correspond.* Where a plaintiff files an account before a justice of the peace, upon which suit is brought, and in it he charges the defendant was guilty of fraud, the plaintiff may recover, although no fraud is proved, if he only establish a right of recovery of which the justice has jurisdiction. And the same practice obtains on a trial of an appeal in the circuit court. *Powell* v. *Feeley*, 143.

LANDLORD AND TENANT.

FORFEITURE OF LEASE—NON-PAYMENT OF RENT.

1. *Of the demand—at common law.* The right of forfeiture for non-payment of rent, being a harsh remedy, has never been favored by the law, and where a lease provides for such forfeiture, the landlord is required, at common law, before he can declare a forfeiture, to make a demand for the rent on the day it falls due, for the precise amount, and at a convenient hour before sunset, at the place specified in the lease,

LANDLORD AND TENANT.

FORFEITURE OF LEASE—NON-PAYMENT OF RENT. *Continued.*

or on the premises if no place is named. Such demand must be made in fact, although no person be present. *Chapman et al.* v. *Kirby*, 211.

2. *Declaration of forfeiture—whether sufficient—offer to pay rent refused.* P leased to K a portion of certain premises, together with a specified quantity of steam power, at a stipulated rent, payable on the first day of each month, from May 1st, 1864, to January 1st, 1869. The steam power thereby leased was to be communicated from lessor's engine, through a shaft to K's machinery. The lease provided for a forfeiture for non-payment of rent. K failed to pay the rent due on the 1st day of May, 1867, and the lessor, on the 7th day of that month, caused to be served upon K, a written notice, notifying him, that, by reason of such default, he had elected to terminate the lease at the expiration of ten days thereafter. The person serving such notice was instructed, by the lessor, not to receive the rent, if K should offer to pay it, which he did offer to do within the ten days after the service of the notice, and it was refused. On the 1st of June following, the lessor severed the connecting shaft, whereby K was supplied with the steam power, and his machinery stopped. In an action by K against the lessor, to recover the damages sustained by reason of such act: *Held*, that there was no valid declaration of a forfeiture by the landlord, so as to terminate the lease and authorize a re-entry; that K's offer to pay the rent within ten days, and the lessor's refusal to receive it, were tantamount to payment, and saved the lease from a forfeiture. Ibid. 211.

3. *Payment of rent made within the ten days after notice—lease saved from forfeiture.* In giving construction to the act of 1865, this court has said, that if the tenant pays the rent in arrears within the ten days after service of the notice, a forfeiture of the lease is thereby prevented. *Chadwick* v. *Parker*, 44 Ill. 326. Ibid. 212.

4. *Mere non-payment of rent—will not authorize the landlord to enter and forcibly expel the tenant or remove tenements or appurtenances.* Under such lease, K acquired the same right to the use of the steam power that he did to occupy the premises, and his failure to pay the rent no more authorized the landlord to cut off such power than it did to enter upon the premises, and forcibly dispossess the tenant thereof. Mere non-payment of rent does not authorize the landlord to enter upon and forcibly expel the tenant, or to remove the tenements or their appurtenances, or any part of them. Ibid. 212.

WAIVER OF FORFEITURE OF LEASE.

5. *By accepting rent.* Where the right had accrued, to declare a lease forfeited for non-payment of taxes which the lessee had covenanted to pay, and thereafter the lessor accepted from the lessee a year's rent

LANDLORD AND TENANT. Waiver of forfeiture of lease. *Continued.*

in advance, and shortly after assigned the lease to another: *Held*, that these acts of the lessor amounted to a waiver of the forfeiture. *Watson* v. *Fletcher*, 498.

6. *Assignee of lessor—bound by assignor's acts.* Nor in such case, does the assignee of the lessor acquire any right to declare a forfeiture, that right having been waived by the acts of his assignor. Ibid. 498.

License to surrender lease.

7. *Whether it may be revoked.* A mere license given by a landlord to his tenant, to surrender the lease, where there is no consideration for such permission, may be revoked by the landlord at any time before it has been acted upon. *Dunning* v. *Mauzy*, 368.

Unlawful acts of landlord.

8. *Rights of the tenant.* Where a party leased a portion of certain premises, together with steam power to be communicated from the landlord's engine to the tenant's machinery, and before the expiration of the lease the landlord cut off the steam power, the tenant had a right to presume that such power would not be restored, and was under no obligation to hold his machinery and stock undisposed of until the end of his term, but could dispose of his lease, stock and machinery, on the best terms he could obtain, and the landlord would be liable for any loss thereby sustained. *Chapman et al.* v. *Kirby*, 213.

LICENSE.

License to surrender a lease.

Whether it may be revoked—when given without consideration. See LANDLORD AND TENANT, 7.

LIENS.

Mechanics' lien.

1. *Persons having a less estate than the fee considered as owners to the extent of their interests.* Where a person holds a less estate than the fee, he is considered, under the statute, as the owner *only* to the extent of his interest or estate, and can not, by his contract, create a lien against the property to any greater extent than his right and interest therein. *McCarty et al.* v. *Carter*, 53.

2. *Of husband's estate in wife's land.* The estate of the husband acquired in the lands of his wife, prior to the passage of the act of 1861, securing to married women the enjoyment of their own property, may, by his contract, be subjected to a mechanic's lien. Ibid. 53.

3. *Of the time within which the contract must be completed.* Under the law of 1845, it was necessary to perform the contract for the delivery

LIENS. MECHANICS' LIEN. *Continued.*

of materials within the specified time, to preserve the lien, but under the act of 1861 it is otherwise. Under the latter act the lien will continue if the materials are furnished after the stipulated time, provided the delivery is completed within one year from the time of commencing their delivery. *Baxter* v. *Hutchings et al.* 116.

4. *Of contracts made with infant owners—no lien created thereby.* See INFANTS, 1, 2, 3.

AS BETWEEN TENANTS IN COMMON.

5. *Where one removes an incumbrance from the common estate—of his equitable lien upon the interest of his co-tenant.* See TENANTS IN COMMON, 1, 2, 3.

LIMITATIONS.

LIMITATION ACT OF 1839.

1. *Color of title—what constitutes—of a judgment in partition.* The judgment of a proper court making partition, purports on its face to convey title, and when valid, vests the title absolutely in the parties as though deeds were executed; and although, in the suit in which such judgment was rendered, a part of the tenants in common were not made parties, nevertheless, such judgment constitutes color of title. *Hassett* v. *Ridgely*, 197.

2. A person relying upon color of title, need not exhibit a perfect chain of title, or go back of the instrument which constitutes his color of title, nor can it be defeated by showing a defect in the title, antecedent to the instrument relied upon as color, or by showing that his color of title was not connected with any source of title. Ibid. 197.

3. *Possession under color of title—whether sufficient—its extent.* Where a party having color of title to land, subdivides it into blocks and lots, streets or other subdivisions, actual possession of the lots by himself, or by his tenants, is a sufficient possession, within the statute, of the whole tract. Ibid. 197.

4. It is not necessary that he should reside upon every part and parcel of the tract, as the streets and lines of lots in nowise destroy the unity or identity of the property, or limit the possession. Ibid. 197.

5. But if he sells a portion of the tract, so as to separate a part from that of which he had actual possession, the unity of the property and the possession are destroyed, and possession does not extend to the isolated portion. Ibid. 197.

6. *Whether a party who has acquired a bar, may recover back his possession under it.* It seems, where a bar has been acquired under the limitation act of 1839, a recovery may be had under it to regain

LIMITATIONS. LIMITATION ACT OF 1839. *Continued.*

possession that has been invaded by a party claiming under paramount title. *Hassett* v. *Ridgley*, 197.*

"EXHIBITING" CLAIMS AGAINST ESTATES.

7. *What constitutes—so as to prevent the bar of the two years limitation.* See ADMINISTRATION OF ESTATES, 3.

LAPSE OF TIME ASIDE FROM THE STATUTE.

8. *Of reforming a deed, or declaring a trust.* A court of chancery will not, after a long lapse of years, interfere to reform a deed, or declare a trust, except upon the most positive and satisfactory evidence of the intention of the parties at the time the deed was executed or trust created. *Nicoll* v. *Mason*, 358.

9. *Of the time within which a sheriff's deed must be executed.* See SHERIFFS' DEEDS, 1 to 4.

10. *Granting letters of administration—of the time within which it should be done.* See ADMINISTRATION OF ESTATES, 7.

LOST PLEADINGS.

HOW SUPPLIED. See PRACTICE, 18.

MALICE.

IN AN ACTION AGAINST AN OFFICER.

For neglect of duty—question of malice does not arise. See OFFICER, 2, 3.

MARRIED WOMEN.

OF RIGHTS ACQUIRED PRIOR TO ACT OF 1861.

1. *Effect of the act in respect thereto.* Where a widow's dower in land was assigned to her before the passage of the act of 1861, and she married a second time before the passage of the act, the law could not divest her second husband of the estate, during coverture, that he acquired by the marriage. *McCarty et al.* v. *Carter*, 57.

OF RIGHTS ACQUIRED IN ANOTHER COUNTRY.

2. *Effect of act of* 1861, *thereon.* It was not the design of the act of 1861, securing to married women the enjoyment of their separate property, to take from husbands rights which had vested in them prior to its passage, or to take from them such as had been acquired in another State or country, subsequent to its passage. *Dubois* v. *Jackson*, 49.

3. So, where parties residing in England were married there in the year 1865, the title to personal property owned by the wife, at once, by

*See *McCagg et al.* v. *Heacock et al.* 42 Ill. 153, and cases there referred to.

MARRIED WOMEN. Of rights acquired in another country. *Continued.*

the law of England, vested in the husband, and upon their subsequent removal to this State, such ownership in the husband remained unchanged. *Dubois* v. *Jackson*, 49.

Of a note payable to a married woman.

4. *At the common law belongs to her husband.* At common law, and independent of the statute, a note payable to the wife belongs to the husband, and he may endorse it, or sue upon it and recover in his own name. *Snider* v. *Ridgeway*, 522.

5. *Whether rule affected by the married woman's act of* 1861. And this rule of the common law is not affected by the act of 1861, except in cases where the consideration for which the note was given belonged to the wife in her own right. Ibid. 522.

6. *When endorsed by her husband—assignee takes it at his peril.* And where a note payable to the wife is endorsed by her husband, the assignee takes it at his peril, and should it afterwards appear that it was her property, the assignee would acquire no title. Ibid. 522.

7. *May be shown to belong to her husband.* And notwithstanding a note is made payable to the wife, it may be shown that the real ownership and title are in the husband. Ibid. 522.

MASTERS' SALES.

Of reporting biddings to the court. See SALES, 8.

MEASURE OF DAMAGES.

In actions on covenant of warranty.

1. *From what time interest to be computed.* L, a grantee holding a covenant of warranty, was sued in ejectment by C, and a recovery had. C conveyed the premises to W, from whom L purchased: *Held*, in an action of covenant, by L, against his original grantors, that L, by the deed from W, obtained only the naked legal title, as the conveyance by C to W did not pass C's claim to *mesne profits;* and L, never having paid *mesne profits*, nor been damnified by the assertion of a claim to them, and C's right to recover them having been cut off by the statute, prior to the trial of L's suit, the defendants could only be charged with interest from the date of C's deed to W, the possession and profits having been enjoyed by L up to that time, under defendant's deed to him, and his purchase from W only covering the *mesne profits* back to the time when W's title accrued. *Wead et al.* v. *Larkin et al.* 99.

In action by a tenant against his landlord.

2. *For interfering with the proper enjoyment of the premises.* A party leased from another a portion of certain premises, together with a specified quantity of steam power, which was to be communicated from the

MEASURE OF DAMAGES.

IN ACTION BY A TENANT AGAINST HIS LANDLORD. *Continued.*

lessor's engine, by means of a shaft to the tenant's machinery. Before the expiration of the lease, the landlord, without having a right so to do, cut off the steam power, and the evidence showed, that in consequence of the act of the landlord, in cutting off the steam power, the lease was rendered valueless, and the stock in trade and machinery of the tenant became depreciated, and his business destroyed: *Held*, that these were all proper elements for the consideration of the jury in ascertaining the measure of damages. *Chapman et al.* v. *Kirby*, 212.

3. And in estimating the losses sustained, by reason of the destruction of plaintiff's business, it is proper for the jury to take into consideration the extent of plaintiff's business, and his profits for a reasonable period next preceding the time when the injury was inflicted, leaving the defendant to show, that by depression in trade, or from other causes, the profits would have been less. Ibid. 212.

4. Nor, in such case, can the plaintiff be confined, in estimating his damages, to the value of the lease during the period from the time the power was withheld until it was connected with the machinery, some five months afterwards. Having been deprived of the power, and his business thereby destroyed, he had a right to presume that it would not be restored, and to sell out his effects, and after such sale he was under no obligation to re-establish his business. Ibid. 212.

IN AN ACTION BY VENDOR AGAINST VENDEE.

5. *For refusing to receive the property sold.* Where a purchaser of personal property, which was to be delivered at a specified place on a certain day and at a stipulated price, refuses to receive and pay for it, the price in the meantime having declined, in an action by the vendor against his vendee for refusing to comply with his contract, it seems the proper rule of damages is the difference between the contract price and the current price at the place of delivery. *McNaught* v. *Dodson*, 446.

VINDICTIVE DAMAGES.

6. *When allowed and when not—generally.* The rule is, that in order to justify the allowance of exemplary or vindictive damages, either gross fraud, malice or oppression must appear; and in the absence of these elements, the damages can not exceed, and must be confined strictly to compensation for the injury sustained. *City of Chicago* v. *Martin et ux.* 241.

IN ACTIONS AGAINST MUNICIPAL CORPORATIONS.

7. *For injury from neglect to repair a street.* In an action on the case, against a municipal corporation, for a personal injury sustained by reason of the mere negligence of the corporation to repair a defect in one of its streets, punitive damages will not be allowed, it appearing that.

MEASURE OF DAMAGES.

IN ACTIONS AGAINST MUNICIPAL CORPORATIONS. *Continued.*

such street was not in the business part of the city, and but little used by the public. *City of Chicago* v. *Martin et ux.* 241.

8. And it is difficult to conceive of a case, against a municipal corporation, which would justify the allowance of exemplary damages. Ibid. 241.

IN TRESPASS FOR ILLEGAL ARREST.

9. *Of an arrest on suspicion.* Where a police officer arrests a party upon suspicion that he is guilty of having committed a known felony, and there are no such circumstances as would justify a strong conviction that he is the guilty party, a jury can exercise a wide and liberal discretion as to the damages they will give, in an action against the officer for the illegal arrest. *Marsh et al.* v. *Smith*, 396.

IN ACTIONS FOR TORT.

10. *Generally.* In all actions of tort, the measure of damages is not less than the amount of injury sustained, and in case, all of the consequential damages sustained, connected with, or flowing from the act complained of. *Chapman et al.* v. *Kirby*, 212.

11. But the damages must be the necessary and natural result of the act, and must be real, and not speculative or probable. Ibid. 212.

MECHANICS' LIEN. See LIENS, 1 to 4.

MISTAKE.

LAPSE OF TIME.

1. *Its effect.* A court of chancery will not, after a long lapse of years, interfere to reform a deed, or declare a trust, except upon the most positive and satisfactory evidence of the intention of the parties at the time the deed was executed or trust created. *Nicoll* v. *Mason*, 358.

MORTGAGES.

CHATTEL MORTGAGES.

1. *Irregular proceedings.* The validity of a chattel mortgage is not affected by irregularities in the proceedings under it. *Hanford* v. *Obrecht*, 146.

2. *Possession by mortgagor after default.* The principle is well settled, that where a mortgagor of chattels retains possession of the mortgaged property, by or through the act of the mortgagee, after default made, such retention is fraudulent *per se.* Ibid. 146.

3. But where, after the default of the mortgagor, a sale of the property under the mortgage is had, and purchased by a third party, in good faith, and for a valuable consideration, who leaves it in the

MORTGAGES. CHATTEL MORTGAGES. *Continued.*

possession of the mortgagor, then, possession so acquired by the mortgagor would be lawful. *Hanford* v. *Obrecht*, 146.

FORECLOSURE BY SCIRE FACIAS.

4. *Return of two nihils.* In a proceeding to foreclose a mortgage by *scire facias*, a judgment of foreclosure may be entered, without personal service, upon a return of two *nihils* upon writs issued and returnable to different terms of the court, notwithstanding both writs were returned on the same days they were issued. *Williams* v. *Ives*, 512.

5. *Judgment in such case—its form.* See JUDGMENTS, 4.

ACCOUNTING ON FORECLOSURE.

6. *Of the basis therefor.* Where there was a first and second mortgage upon a railroad, and the management of the road was given into the hands of a trustee, upon foreclosure the trustee will be held to account for the earnings of the property while managed and operated by him; and in a foreclosure suit upon the first mortgage, it was error for the court to decree that the right of the mortgagor corporation to have such accounting should depend on the redemption from the sale to such trustee under the second mortgage, within 90 days thereafter, and in default of such redemption, the mortgaged property should be sold to pay the first mortgage. *Racine & Mississippi Railroad Co.* v. *The Farmers' Loan & Trust Co. et al.* 332.

7. In such case, the decree should be, that the account be first taken and stated, and a reasonable time should be given for the redemption from the sale under the second mortgage, and for the payment of such balance as should be found due on the first mortgage debt, after deducting the net earnings of the property, and that in default of such redemption and payment being made, the property be sold in satisfaction of said first mortgage debt. Ibid. 332.

8. In such accounting, the mortgagor corporation was entitled to a credit, for the earnings of a certain line of railroad, which had been constructed by such trustee with money furnished by the first mortgagee, and which road had been built along the line of a partially completed railroad belonging to the mortgagor corporation, which by its contiguity rendered the road of the mortgagor less valuable than it otherwise would have been. Ibid. 332.

9. The earnings of such other road must be ascertained down to the date of the decree only, as an account of the earnings or amounts to a later period, was waived, as appears by the recitals of the decree. Ibid. 332.

MORTGAGOR CAN NOT DENY HIS TITLE.

10. A mortgagor can not be permitted, in a suit to foreclose, to deny his title to the mortgaged premises. Ibid. 332.

MOTION.

RAISING QUESTION OF JURISDICTION.

Where process is sent to foreign county—not by motion. See ABATEMENT, 2.

MUNICIPAL CORPORATIONS.

AS TO KEEPING STREETS IN REPAIR.

Their duties and liabilities. See HIGHWAYS, 5.

VINDICTIVE DAMAGES.

Whether recoverable against a municipal corporation. See MEASURE OF DAMAGES, 7, 8.

NEGLIGENCE.

NEGLIGENCE IN RAILROADS.

1. *As to the safety of their machinery.* The law requires of railroad companies, in exercising their franchises, so to use them as not to endanger the security of persons, so far as the employment of human sagacity and foresight can reasonably anticipate and prevent; and to that end, they must provide good and safe machinery, constructed of proper materials and free from defects, so far as known and well recognized tests can determine, and employ skillful and experienced servants in the use of such machinery, and exercise care and vigilance in its examination, to see that it is kept in proper repair and in a safe condition; and when these requirements have been complied with, they can not be held liable for accidents occurring by which an injury is sustained by a person not under their control or care. *Illinois Central Railroad Co.* v. *Phillips*, 234.

2. While these corporations can not be held liable for injuries that may result from using their franchises, where skill and experience are unable to foresee and avoid them, nor for the acts of persons not in their employment, and over whom they have no control, they will be held responsible for injuries that result from a failure to exercise judgment and skill in the selection of material, construction of their machinery, and in its use upon their roads. Ibid. 234.

3. *Evidence of negligence—explosion of steam boiler.* In an action against a railroad company, for injuries alleged to have been sustained by the plaintiff, while in the depot of the defendants, from the explosion of the boiler of one of defendants' engines: *Held*, that the mere fact that the boiler exploded was *prima facie* evidence of negligence, to overcome which, it must be shown, that the materials used in its construction were of the kind usually employed, and that it had been subjected to and withstood the usual tests, and was used with judgment and skill, by persons of experience. Ibid. 234.

NEGLIGENCE. NEGLIGENCE IN RAILROADS. *Continued.*

4. *Liability for injury to passengers, arising from bad condition of the road.* In an action against a railroad company, for injuries received by the plaintiff, from the upsetting of one of defendants' cars, when traveling upon its road, where the proof showed that the track where the accident occurred was in a wretched condition, the rails being badly worn and insecurely fastened, of various lengths, loose at the ends, and with spaces between the joints, which were filled with wooden plugs, and that some of the ties were broken in the middle: *Held*, that this was such gross and wanton negligence on the part of the company as to render it liable for the injury resulting therefrom. *Toledo, Wabash & Western Railway Co.* v. *Apperson*, 480.

5. Railroad companies are bound to keep themselves informed as to the condition of their tracks, and to know whether they are in a fit condition for the safe passage of their trains or not. Ibid. 480.

6. *Of stock killed—duty of the owner as to its disposal.* Where cattle have been killed upon a railroad, and the stock, at the time the injury occurred, was in good condition, it is the duty of the owner to dispose of it to the best advantage possible, by converting it into beef, or otherwise, and he is entitled to a reasonable time thereafter within which to do so. *Toledo, Peoria & Warsaw Railway Co.* v. *Parker et al.* 385.

7. And it can not be objected in such case, that the owner failed to perform his duty in the premises, in not disposing of the stock to some profit, where the evidence shows that on the evening of the day when the injury occurred, the stock was taken possession of and buried by the employees of the defendant. Ibid. 385.

8. *Sufficiency of evidence—in action against a railway company for killing stock.* See EVIDENCE, 14.

OF COMPARATIVE NEGLIGENCE.

9. Negligence, resulting in injury, is comparative, and it is not required that the plaintiff, in an action against a railroad company, to recover for injuries received by reason of the alleged negligence of the latter, shall be free from all negligence himself, or that he shall exercise the highest possible degree of prudence and caution, to entitle him to recover, if it appear the defendant was guilty of a higher degree of negligence. *Chicago, Burlington & Quincy R. R. Co.* v. *Payne, Admr.* 500.

10. But in cases of mutual negligence, to authorize a recovery by the plaintiff, the negligence on the part of the defendant must be so much greater than that of the plaintiff, as to clearly preponderate. Ibid. 500.

11. And where the negligence is equal, or nearly so, or that of the plaintiff is greater, he can not recover. Ibid. 500.

NEGLIGENCE. *Continued.*

CONTRIBUTORY NEGLIGENCE.

12. *Has no application in an action against an officer for neglect of duty.* See OFFICER, 1.

NEGLIGENCE IN ERECTION OF BUILDINGS.

13. *Liability of contractor—from negligence of his superior.* A contractor employed to do the brick work upon a building, under the plan and direction of an architect, as an agent of the owner, can not be held liable for the acts either of the architect or the owner. *Daegling* v. *Gilmore*, 248.

14. If the contractor performs his work with skill and in a workmanlike manner, under the direction of the architect, and in accordance with his plan, he can not be held answerable in damages, for an accident which occurs from the falling of the building, where such accident was the result of a defect in the plan of the architect, not known to the contractor. Ibid. 248.

15. *Liability of the contractor.* In such case, the contractor, working under the plans and direction of the architect, only undertakes that *his* work shall be skillful and workmanlike, and can only be held liable for its sufficiency. Ibid. 248.

16. A case might occur, where a plan was so defective that a person unskilled in the principles of architecture would know that it was unsafe, in which case, a contractor, working under such a plan, furnished by an architect, would be liable; but ordinarily such is not the case, unless it could be shown that the contractor knew the plan was defective, as in such case he has no right, knowingly, to endanger community. Ibid. 248.

OF KEEPING STREETS IN REPAIR.

Negligence in cities in respect thereto. See HIGHWAYS, 5.

OF EXPOSED EXCAVATIONS IN STREETS.

Liability of cities for neglect in respect thereto. See HIGHWAYS, 1 to 4.

NEGLECT OF DUTY BY AN OFFICER.

Upon what basis his liability rests. See OFFICER, 1, 2, 3.

NEGOTIABLE INSTRUMENTS.

OF THE LEGAL AND EQUITABLE TITLE THERETO.

1. The endorsement of a bill of exchange to one person for the use of another, passes the legal title to the endorsee, but only the equitable title to him for whose use the bill was endorsed. *Sturges' Sons* v. *Metropolitan National Bank of N. Y.* 220.

NEGOTIABLE INSTRUMENTS. *Continued.*

WHAT IS NOTICE TO A HOLDER.

2. When a party is about to receive a bill or note, if there be any such suspicious circumstances accompanying the transaction, or within the knowledge of the party, as would induce a prudent man to inquire into the title of the holder, or the consideration of the paper, he shall be bound to make such inquiry, or if he neglects to do so, he shall hold the bill or note subject to any equities which may exist between the previous parties to it. In other words, he shall act in good faith, and not willfully remain ignorant, when it was his duty to inquire into the circumstances and know the facts. *Sturges' Sons* v. *Metropolitan National Bank of N. Y.* 220.

OF CONFLICTING EQUITIES.

3. *Which shall prevail.* In an action against the drawer of a bill by an endorsee, to whom the bill was transferred without consideration from him, for the use of another, the latter has only an equity, and if he had notice that the payee had not paid the drawer for the bill, but had obtained it fraudulently, the equity of the drawer is superior to that of the equitable endorsee, and no recovery can be had. Ibid. 220.

OF A BILL DISCOUNTED BY ACCEPTOR, BEFORE MATURITY.

4. *Effect upon its negotiability.* The principle is well settled, that a bill of exchange, discounted by the acceptor before maturity, does not lose its negotiability, and if re-issued by the acceptor, before it falls due, to a stranger, who takes it in good faith, and for a valuable consideration, the parties whose names appear on the bill as endorsers are liable to the holder, the same as if it had not passed through the hands of the acceptor. *Rogers* v. *Gallagher*, 182.

NEW TRIALS.

VERDICT AGAINST THE EVIDENCE.

1. This court has repeatedly said, that in cases where there is a contrariety of evidence, and the facts and circumstances will, by a fair and reasonable intendment, warrant the inference of the jury, the court will reluctantly, if ever, disturb the verdict, notwithstanding it may appear to be against the weight of the testimony. *O'Brien* v. *Palmer*, 72.

2. But where the evidence is conflicting, this court will not disturb the verdict, even though it may be against the weight of evidence. It is the peculiar province of the jury to determine its preponderance. Ibid. 72.

3. In a case where the evidence is conflicting, it is for the jury to determine its weight; and, when they have determined it, their verdict will not be disturbed unless it is manifestly against the evidence. *Jacquin* v. *Davidson*, 82; *Baker* v. *Robinson*, 299; *Hartley* v. *Hartley*, 302; *Lalor* v. *Scanlon*, 152; *McCarthy* v. *Mooney*, 247.

NEW TRIALS. VERDICT AGAINST THE EVIDENCE. *Continued.*

4. Where a cause is tried before the court, without a jury, and the evidence is conflicting, this court will not disturb the finding. *Weaver* v. *Crocker*, 461.

5. Where a verdict is manifestly against the evidence, a new trial will be granted. *Maynz* v. *Zeigler*, 303; *Ammerman* v. *Teeter*, 400; *Crabtree et al.* v. *Fuquay*, 520.

6. Where the only testimony to sustain the action was that of the plaintiff himself, who was flatly contradicted by the defendant, and two other witnesses, who were disinterested, and who had full opportunity of knowing the facts to which they testified, and there was no impeachment of their integrity, and the jury found in favor of the plaintiff: *Held*, that such verdict was unwarranted, being manifestly against the weight of evidence, and should be set aside and a new trial awarded. *Haycraft* v. *Davis*, 455.

7. It is the province of the jury to weigh evidence, but they have no right to act from caprice, and render a verdict wholly against the evidence. Ibid. 455.

8. Where a verdict is for a larger amount than the evidence warrants, a new trial will be granted. *Schwabacher et al.* v. *Wells*, 257.

EXCESSIVE DAMAGES.

9. In an action of trespass, where the proof showed an assault of an outrageous character made upon the plaintiff, and without provocation, a verdict for $600 can not be considered unreasonable, the court having properly instructed the jury that they could find exemplary damages, if they believed the evidence showed an aggravated assault. *Kelsey* v. *Henry*, 488.

10. In an action of trespass for false imprisonment and for assault and battery, the jury assessed the plaintiff's damages at $1,700, upon which judgment was rendered: *Held*, that such damages could not be considered excessive, the proof showing, that the defendant, influenced solely by a willful and malicious nature, procured the arrest and prosecution of the plaintiff upon a charge of larceny, without the slightest grounds upon which to base a justification of, or even to instigate, his conduct. *Reno* v. *Wilson*, 95.

11. But, where a person in good faith, and for probable cause, makes a criminal charge against another, the party so charged can not, in the event of his discharge, recover heavy damages in an action for trespass against such person. Ibid. 95.

12. And in such case a new trial will not be awarded, on the ground, alone, that the damages were excessive, even though this court would have been better satisfied with a verdict for a less amount, the jury

NEW TRIALS. Excessive damages. *Continued.*

having the right to give punitive or exemplary damages, and their verdict being warranted by the facts in the case. *Reno* v. *Wilson*, 95.

Newly discovered evidence.

13. Although a verdict returned in a case where the testimony was conflicting, will not usually be disturbed, merely because the appellate court inclines to a different view from that taken by the court below, yet, when it is shown on the motion for a new trial that there was newly discovered evidence, not cumulative in regard to the particular point to which it relates, and the importance of which could not have been foreseen, and such newly discovered evidence strengthens the conviction of the court that justice has not been done, a new trial will be granted. *Wilder* v. *Greenlee et al.* 253.

Want of diligence.

14. *Must know the terms of court.* A new trial will not be awarded, on the ground, merely, that the attorney of the party against whom judgment was rendered did not know when the term of the court was held at which the judgment was taken, and hence failed to appear and defend the suit. *Hartford Fire Ins. Co.* v. *Vanduzor*, 490.

15. The time for holding the various courts of this State is fixed by statute, and it is the duty of attorneys and parties to know, and the law charges them with a knowledge of, the time so fixed, and if they neglect to inform themselves, the effect is the same as if they had actual knowledge, and failed to attend. In such case, a party, to entitle himself to a new trial, must show that he has used reasonable diligence. Ibid. 490.

16. *Sickness no excuse.* The mere fact that a party defendant is sick and unable to attend the court to which he has been summoned, does not excuse him from diligence in defending the suit. *Shaffer* v. *Sutton*, 506.

The granting of a new trial.

Can not be assigned for error. *Weaver* v. *Crocker*, 461.

NIHIL.

Return of two nihils.

On foreclosure by scire facias. See MORTGAGES, 5.

NOTICE.

Notice by possession.

1. *To whom it applies.* A purchaser of land at a sale under a decree in a suit for partition, sought to avoid the payment of the purchase money on the ground that the heirs who instituted the proceeding had notice of an outstanding equity which was in a party in possession, and were therefore guilty of a fraud upon the purchaser; but it was held,

NOTICE. NOTICE BY POSSESSION. *Continued.*

that while the possession of the adverse claimant was notice of whatever equities he had, it was precisely the same notice to the purchaser under the decree, as to the heirs, and they, therefore, stood upon common ground in that regard. *McManus* v. *Keith et al.* 390.

SETTING ASIDE A SALE IN PARTITION.

2. *Notice to the purchaser.* The purchaser at the sale of lands made under a decree in partition, must have notice of a motion to set aside such sale. *Comstock et al.* v. *Purple et al.* 159.

WHERE A PARTY ACTS WITHOUT AUTHORITY.

Necessity of notice to party in interest that he will be held liable. See AGENCY, 7.

TRANSFER OF NEGOTIABLE INSTRUMENTS.

What constitutes notice to an endorsee, of an infirmity in the title. See NEGOTIABLE INSTRUMENTS, 2.

ASSESSMENT OF NATIONAL BANK SHARES.

Of the notice required by act of 1867. See TAXES, 10.

NUISANCE.

WHAT CONSTITUTES A NUISANCE.

Of erecting wharves on the bank of a river—and herein of the right so to change the channel as to render such wharves a nuisance. See RIPARIAN OWNERS, 3.

OFFICER.

NEGLECT OF DUTY.

1. *Liability therefor—upon what basis it rests.* In an action on the case, against an officer, to recover damages for his willful neglect to perform an imperative duty imposed upon him by statute, the question of contributory negligence can not arise. *Strickfaden* v. *Zipprick*, 286.

2. And in actions of this character, the question of malice is unimportant, except as bearing upon the question of damages. Ibid. 286.

3. In such cases, the gravamen of the action is not the wrongful act, but the neglect to perform an imperative duty, and the good faith with which the defendant acted, or failed to act, can not be considered. Ibid. 286.

IN TRESPASS AGAINST AN OFFICER.

Whether the legality of his appointment can be inquired into. See PLEADING AND EVIDENCE, 1.

POLICE OFFICER—ARREST.

Duty of officer to arrest on suspicion. See ARREST, 1, 2.

OUTSTANDING TITLE.

PURCHASE THEREOF BY ONE TENANT IN COMMON.

Rights of his co-tenant. See TENANTS IN COMMON, 4.

PARTIES.

IN SUIT FOR PARTITION.

1. *And herein, at what stage of the cause additional parties may be made.* Where, in a suit for partition of lands, a decree for partition was rendered, and a sale made by the master, and subsequently, proceedings were instituted to set aside the sale, and an order to that effect granted, and this, without any notice thereof to the purchaser at the sale; and such purchaser, thereafter, and after an appeal had been taken from such order, but not perfected, by one of the parties to the record, made application to be made a party defendant to the proceedings, which the court granted, but decreeing, also, that the decree setting aside the sale should be binding upon him, the same as if he had formerly been made a party thereto, and leave was granted him to appeal therefrom: *Held*, that the proceedings allowing such purchaser to be made a party defendant, at that stage of the cause, although irregular, were nevertheless proper and just, in order that he might suffer no injury from proceedings of which he had had no notice, and against which he had no opportunity to defend. *Comstock et al.* v. *Purple et al.* 158.

2. *All persons having an interest must be made parties.* In proceedings for partition, the statute requires, that every person having an interest in the subject matter shall be made a party, and where persons holding such interests are not made parties to the proceedings, and afforded an opportunity of being heard in defense of their rights, they can not be deprived of their property, or otherwise bound by such proceedings. *Hassett* v. *Ridgley*, 197.

ILLINOIS AND MICHIGAN CANAL.

3. *Who may be sued for negligence in respect thereto.* Where an injury results from a neglect to keep the Illinois and Michigan Canal in repair, an action therefor is given against the State Canal Trustee, but it will not lie against the Board of Trustees. *Board of Trustees of Illinois & Michigan Canal* v. *Adler*, 311.

PARTIES IN CHANCERY.

4. *Purchaser from equitable owner of land may maintain a bill against a fraudulent holder of the legal title.* See TRUSTS AND TRUSTEES, 4.

PARTITION.

APPORTIONING INCUMBRANCES.

1. *Under act of* 1861. Where a bill is filed for partition, and it appears the defendant has paid off an incumbrance upon the common

PARTITION. APPORTIONING INCUMBRANCES. *Continued.*

estate, whereby a lien has accrued to him upon the interest of his co-tenant, for contribution, the court may, in making partition, decree that the complainant shall take his allotment subject to such equitable lien, without a cross-bill being filed for that purpose. The partition act of 1861, expressly authorizes the apportionment of incumbrances, though the lien could not be enforced in such suit, by a sale, without a cross-bill asking such affirmative relief. *Titsworth et al.* v. *Stout*, 81.

WHETHER PARTITION MUST BE AMONG ALL IN SEVERALTY.

2. Two of several tenants in common commenced a proceeding in partition, making certain unknown owners parties defendant. Each of the petitioners had allotted to him his share in severalty, and the unknown owners their shares in common; and this, it seems, was regular. *Hassett* v. *Ridgley*, 200.

TITLE PASSES BY THE JUDGMENT.

3. *Without an interchange of deeds.* In partitions at law, where the court has jurisdiction, the judgment vests the legal title to the portions assigned to the respective owners; in such cases, an exchange of deeds by the several owners is not necessary for the purpose. Ibid. 201.

COLOR OF TITLE.

Of the effect given to a judgment in partition, as color of title. See LIMITATIONS, 1.

PARTIES IN PARTITION. See PARTIES, 1, 2.

PRACTICE IN SUCH PROCEEDINGS.

Of making a purchaser at a sale in partition, a party to the suit, and at what stage of the cause. See PARTIES, 1.

PARTNERSHIP.

WHAT CONSTITUTES A PARTNERSHIP.

1. *When it exists as to third persons.* Parties may so conduct themselves as to be liable to third persons as partners, when in fact no partnership exists as between themselves. The public are authorized to judge from appearances and professions, and are not bound to know the real facts. *Phillips* v. *Phillips*, 437.

2. *As between the parties themselves.* But a partnership can only exist as between the parties themselves, in pursuance of an express or implied agreement to which the minds of the parties have assented; the intention or even belief of one party alone, can not create a partnership without the assent of the others. Ibid. 437.

3. *Construction of particular agreement between partners.* I and F entered into a written agreement, whereby F advanced to I $10,000, to be used by him at his saw mill in Wisconsin, and I agreed to consign to

PARTNERSHIP. WHAT CONSTITUTES A PARTNERSHIP. *Continued.*

F, at Chicago, all the lumber manufactured by him during a certain period, and which F was to sell, retaining his advances out of the proceeds. F had the option of either selling the lumber by the cargo, or of yarding it, and if he sold in the former mode, he was to have a certain per cent. as his commissions, and if in the latter, one-half of the profits over and above all cost, I agreeing that the cost should not be above a fixed sum. Afterwards, and before any lumber was received under this agreement, a second one was entered into, by the terms of which the former one was continued in force, but as amended by the second, and which created a partnership between them, under the name of I and F, "for the sale of the product of the aforesaid saw mill," and also for the purchase and sale of lumber at Chicago. This agreement provided, that the product of I's mill should be charged to the yard of I & F, at $1.00 per thousand less than the market rates at the time of the arrival of each cargo at Chicago, or should be invoiced to the yard at the net cost of manufacture. The option between these two modes was left to F, who was to make his election and signify it to I within a certain time, and which he did, and elected to take by the former mode: *Held*, that these agreements did not create a partnership in the profits of the lumber manufactured by I, at his mill; that F, by his election, became the mere purchaser of the lumber at a fixed price with reference to the market rates, taking no interest in either the losses or gains that may have attended its manufacture. *Freese* v. *Ideson, Admx.* 191.

APPLYING FIRM PROPERTY TO INDIVIDUAL USES.*

4. *Rights of the partners as between themselves.* A partner can not sell partnership property in payment of his individual debt, without the assent of his partner; to do so is a perversion of the firm property, and operates as a fraud upon the other partner. And for the same reason, one partner can not mortgage the chattels of the firm to secure his individual debt, without the assent of his partner, so as to prevent the latter from having such property applied to the payment of the firm indebtedness. *Smith* v. *Andrews et al.* 28.

5. Where a partner makes such a mortgage to secure such a debt, it does not operate as a mortgage on the interest of the maker in the property, as on its foreclosure the property would be diverted from the use of the firm, and would create a tenancy in common between his partner and the purchaser or holder under the mortgage. But it may be, that if, on the payment of the firm debts, and a division of the assets of the firm, such property fell to the mortgagor, the mortgage would become

*See, also, *McNair et al.* v. *Platt*, 46 Ill. 211; *Wittram* v. *Von Wormer*, 44 Ill. 525; *Casey et al.* v. *Carver et al.* 42 Ill. 225; *Marine Company of Chicago* v. *Carver et al.* ib. 66.

PARTNERSHIP. APPLYING FIRM PROPERTY TO INDIVIDUAL USES. *Continued.*

operative and could be enforced. Such is the effect of a sale on execution of a partner's interest in the firm property. *Smith* v. *Andrews et al.* 28.

PAUPERS.

LIABILITY OF COUNTIES.

1. *For medical services rendered to persons other than paupers.* Under sec. 4 of the pauper act, a liability is imposed upon counties to pay a reasonable compensation to a person who has been legally employed to, and does render medical aid to persons falling sick within the county, and having no money or property with which to pay for such services. *Board of Supervisors of La Salle County* v. *Reynolds*, 186.

WHO SHALL DETERMINE THE ALLOWANCE.

2. *Decision of the board of supervisors not final.* In such cases, the obligation of the county is, to allow a reasonable compensation, and the decision of the board of supervisors, as to what is a proper allowance, is not conclusive; and if a proper amount is not allowed, an action may be maintained therefor. Ibid. 186.

OF PERSONS NOT PAUPERS.

3. *Need not be sent to the "poor house."* In such cases, persons so falling sick with a contagious disease, are not paupers within the meaning of the statute, and in an action to recover for medical aid so furnished to them, the liability of the county is not affected by the fact that a "poor house" had been provided in the county for the reception of paupers. Such an establishment is not designed to receive persons afflicted with contagious disease, but only those who are technically paupers. Ibid. 186.

PAYMENT.

PAYMENT TO A GUARDIAN.

What constitutes. See GUARDIAN AND WARD, 1.

PERSONAL AND REAL PROPERTY.

OF PROPERTY CONVEYED IN TRUST.

Whether realty or personalty. See REAL AND PERSONAL PROPERTY, 1, 2, 3.

PLEADING.

OF THE DECLARATION.

In an action for non-delivery of property—readiness and willingness to pay must be averred. See CONTRACTS, 6.

JOINDER OF COUNTS—IN EJECTMENT. See EJECTMENT, 1, 2.

PLEADING. *Continued.*

PLEA IN ABATEMENT.

When necessary. See ABATEMENT, 1.

PLEADING AND EVIDENCE.

IN TRESPASS AGAINST AN OFFICER.

1. *Whether the legality of his appointment can be inquired into.* In an action of trespass assault and battery, and false imprisonment, the defendant justified the arrest out of which the alleged cause of action arose, which arrest was without warrant, upon the ground that he was an officer and found the plaintiff intoxicated and in a suspicious condition in respect to a larceny: *Held*, that the question whether the defendant was an officer legally appointed, could not be tried in this action. *Marsh et al.* v. *Smith*, 396.

NUL TIEL CORPORATION.

2. *Sufficiency of proof.* The rule is well settled in this State, that under a plea of *nul tiel corporation*, where an organization in fact and a user is shown, the existence of the corporate body is proved. *Mitchell et al.* v. *Deeds*, 417.

ALLEGATIONS AND PROOFS.

In ejectment—estate recovered must conform to the declaration. See EJECTMENT, 7, 8.

PLEDGE.

TITLE OF THE PLEDGOR.

Effect upon rights of pledgee. See SALES, 3.

POLICE OFFICER.

OF ARRESTS UPON SUSPICION.

Duty of the officer. See ARREST, 1, 2.

POOR HOUSES.

FOR WHAT PERSONS INTENDED.

Not those afflicted with contagious diseases. See PAUPERS, 3.

POSSESSION.

OF NOTICE BY POSSESSION. See NOTICE, 1.

PRACTICE.

TIME OF MAKING CERTAIN OBJECTIONS.

1. *As to admissibility of evidence.* An objection to the admissibility of evidence can not be made for the first time in this court. *Toledo, Peoria & Warsaw Railway Co.* v. *Parker et al.* 385.

2. *Of the consolidation of actions of ejectment.* Where two actions of ejectment, brought against the same defendant, by different plaintiffs,

PRACTICE. Time of making certain objections. *Continued.*

were docketed as one, and the defendant pleaded to them as one case, and went to trial, it was too late afterwards to ask that the plaintiffs elect which action they will prosecute. The defendant should have pleaded separately, and had the cases separately docketed, and not waited until the plaintiffs had adduced all of their evidence. By going to trial, and treating it as one case, defendant waived the right to object. *Hardin et al.* v. *Kirk*, 153.

3. *That a court of chancery has not jurisdiction because there is a remedy at law.* See CHANCERY, 1.

Of general and special objections to evidence.

4. This court has repeatedly said, that a general objection to an instrument of evidence, raises only the question of relevancy. If obnoxious to a special objection, that objection must be stated, in order that the party offering the proof may, if in his power, have an opportunity to remove the objection. When the objection could not, from its nature, be removed by proof, such objection need not be specified, but is available on appeal or error. *Moser et al.* v. *Kreigh et al.* 84.

Of excluding evidence after its admission.

5. It has been the practice, in some courts, to exclude evidence from the jury which has been admitted without objection, but this court are not inclined to favor it. The true practice is, when evidence thought to be improper is offered, to object to it, stating the objections, and if not sustained, then to except to the opinion of the court admitting it. *Hanford* v. *Obrecht*, 149.

Receiving additional proof ex parte.

6. After a cause has been fully argued and submitted to the court for its decision, it is error for the court to receive additional evidence from either party, without the knowledge of the other. *Comstock et al.* v. *Purple et al.* 160.

Raising a question by an instruction.

7. In an action of replevin for a colt, it appeared that while the animal was in the possession of the plaintiff, the defendant, claiming to be the owner, obtained permission to take it home with him, upon the condition, that if, after his family had examined the colt, they would not identify it as his, upon oath, before a justice of the peace named, he would return it the same day. The evidence showed that the defendant neither procured the evidence nor returned the colt. Instructions were given, based upon the hypothesis that neither party owned the colt: *Held*, if the plaintiff desired to raise the question whether the defendant was bound to return the animal when he failed to make the proof proposed, he should have asked an instruction presenting that question. *Baker* v. *Robinson*, 299.

PRACTICE. *Continued.*

EXAMINATION OF WITNESS.

8. *Whose deposition has been taken—whether allowable.* Anciently, when a witness had given his deposition, neither party was permitted to again examine him, by deposition or otherwise. But the rule has been modified, so that, when the deposition of a witness has been read to the jury, the opposite party may call him as his own witness. *Board of Trustees of Ill. & Mich. Canal* v. *Adler*, 311.

9. But where a deposition has been regularly taken, the opposite party having the right to attend and cross-examine the witness, such party, on failing to exercise that right, can not be permitted afterwards to cross-examine the witness as the witness of the party who took the deposition. By failing to attend at the taking of the deposition, the adverse party waives his right to cross-examination. Ibid. 311.

SEALING A VERDICT—SEPARATION OF JURY.

10. *When judgment may be entered.* Where parties stipulated, in open court, that the jury might seal their verdict, deposit it with the clerk, and then separate, such delivery is equivalent to a delivery in open court, and the power of the court to open and act upon it at a subsequent term is unquestionable. *Pierce* v. *Hasbrouck*, 24.

11. Nor is the authority of the court so to act, at all lessened because of an agreement by the parties that such verdict should be opened on a particular day of the term at which it was rendered. The court, nevertheless, may open and act upon it on any other day. Ibid. 24.

SEALING A VERDICT—DISCHARGE OF JURY.

12. *Whether error to so direct.* Where a circuit judge directed a jury, on their retirement, that they could reduce their verdict to writing, seal it, leave it with the clerk, and then be discharged for the term, such action can not be assigned for error, unless the party at the time objects, and preserves the question in a bill of exceptions. *Powell* v. *Feeley*, 143.

QUESTIONS OF LAW AND FACT.

13. The question whether a mortgage has been properly executed and acknowledged, is one of law, to be decided by the court, and should not be left to the jury. *Bullock* v. *Narrott*, 62.

14. In an action of trespass for false imprisonment, it is not for a jury to determine what acts would make the plaintiff liable to arrest. *Reno* v. *Wilson*, 95.

15. In an action for trespass, based upon an alleged illegal arrest of the plaintiff, where the defendant justified as a policeman of a city, the court, in leaving the question to the jury as to whether the defendant was a duly and legally appointed policeman, should explain to them what constitutes such appointment. *Marsh et al.* v. *Smith*, 396.

PRACTICE. QUESTIONS OF LAW AND FACT. *Continued.*

16. In an action on an injunction bond, it was held to be erroneous for the court to instruct the jury what amount to find. *Billings* v. *Sprague*, 510.

17. Where stock have been injured or killed on a railroad, it is the duty of the owner, within a reasonable time after the occurrence, to dispose of it to the best advantage, so as thereby to lessen the loss as much as may be, but an instruction which assumes to inform the jury what was a reasonable time within which the owner should have taken possession of the injured stock, is erroneous; that question is for the jury to determine, from all the circumstances. *Toledo, Peoria & Warsaw Railway Co.* v. *Parker et al.* 385.

LOST PLEADINGS.

18. *How supplied.* It is a familiar rule of practice, where the pleadings in a cause are lost, to permit them to be supplied by copy. And in cases where the papers have been mislaid, or are in the hands of one of the parties, or his attorney, and can not be had, the court may, in the exercise of a sound discretion, permit them to be supplied by copies, in order to avoid a continuance of the cause. *Hartford Fire Ins. Co.* v. *Vanduzor*, 489.

REMOVING PAPERS FROM THE FILES.

19. *Not allowable.* All papers filed in a cause should be preserved by the clerk in his office, and should not be removed therefrom except by leave of the court. Ibid. 489.

PRACTICE IN CRIMINAL CASES.

20. *Improper conduct of counsel in address to the jury.* Where, in a capital case, counsel, in his argument to the jury, made a statement, against objection, that he had a witness by whom he could have proved a certain declaration made by the prisoner, stating it, but that she was sick, such declaration being a serious admission against him: *Held*, that such conduct was improper, and that the court should have excluded the statement from the jury. *Yoe* v. *The People*, 410.

MAKING ADDITIONAL PARTIES.

In suit for partition—of making the purchaser at the sale a party to the proceeding. See PARTIES, 1.

SENDING PROCESS TO FOREIGN COUNTY.

In what county a contract is made. See CONTRACTS, 9.

Mode of questioning jurisdiction of the person, in such cases. See ABATEMENT, 1.

PRACTICE IN THE SUPERIOR COURT OF CHICAGO.

BRINGING A CAUSE ON FOR TRIAL.

1. *Out of its order on the calendar.* The rule of practice adopted by by the Superior Court of Chicago, which permits a plaintiff in any case *ex contractu*, pending on an issue of fact only, or only requiring the *similiter* to be added, to bring the same to trial out of its regular order on the trial calendar, upon affidavit that he believes the defense is made only for delay, and giving five days' notice, unless it shall be made to appear by affidavit of facts in detail that the defense is made in good faith, does not contravene any law governing that court, and is within its power to adopt. *Wallbaum* v. *Haskin et al.* 313.

PRACTICE IN THE SUPREME COURT.

ACTION OF COURT BELOW MUST BE FINAL.

1. *Before it can be brought before the appellate court.* A decree of foreclosure of a mortgage having been entered in the court below, a writ of error was sued out, pending which a sale was had under the decree. The appellate court having modified the decree, the plaintiff in error presented to this court an additional record, showing the sale, and asked that the circuit court be directed to set the same aside. But it was held, the motion must be made in the court below, and when decided there, the action of that court could be reviewed here. *Racine & Miss. R. R. Co.* v. *The Farmers' Loan & Trust Co. et al.* 333.

MODIFICATION OF DECREE—REVERSAL.

2. Although a decree may not be wholly reversed, but only modified, yet so far as the modification may affect the further action of the court below, the decree must be regarded as reversed. Ibid. 333.

GRANTING A NEW TRIAL.

3. *Can not be assigned for error.* The rule is well settled, that an appellate court will never review the decision of the circuit court in granting a new trial. Whenever a new trial is granted, this court will not disturb it. *Weaver* v. *Crocker*, 461.

CROSS ERRORS.

4. *When necessary.* Where an appellee, in a chancery suit brought to this court, desires to question the correctness of the decree rendered in the court below, he must assign cross errors; otherwise, this court will not examine the record, to ascertain whether errors have been committed which operate injuriously to him. *Johnston* v. *Maples et al.* 102.

WHAT THE RECORD SHOULD CONTAIN.

5. *When all the pleadings not necessary.* Where the record shows that the court below, in refusing an injunction and dismissing a cross bill, acted *alone* upon such bill, without considering the original bill, in the proceedings thereunder, a writ of *certiorari* will not be allowed to bring up a copy of the original bill. In such case, it is not necessary

PRACTICE IN THE SUPREME COURT.

WHAT THE RECORD SHOULD CONTAIN. *Continued.*

that this court should inspect both the original and cross bills, in order to determine whether the court erred in its decree. *Western Union Telegraph Co.* v. *Pacific and Atlantic Telegraph Co.* 90.

CONFESSION OF ERRORS.

6. *Effect thereof.* And where, on an appeal to this court, from a decree denying an injunction and dismissing the cross bill of appellant, the appellant assigned as error—1st, That the court erred in denying the injunction; 2d, That the court erred in dismissing said cross bill; 3d, That the court erred in rendering a decree against the plaintiff, and 4th, That the court erred in not granting the relief prayed for by plaintiff; and the appellee afterwards confessed these errors, with the exception of the 4th: *Held*, that appellee thereby admitted, that the cross bill, on its face, presented a case, which, unanswered, in equity entitled appellant to an injunction. Ibid. 90.

OF RETAINING A CAUSE FOR FURTHER PROCEEDINGS.

7. A bill in chancery was filed, asking for the dissolution of an alleged partnership between the complainant and the defendants, and that an account be taken. On an appeal to the Supreme Court, it was held there was no partnership, but the court allowed the bill to be retained, in order that the question might be presented, whether such a state of facts appeared from the record as would entitle the complainant to compensation on the principle of a *quantum meruit*, and to have the cause remanded with leave to amend the bill for that purpose. *Phillips* v. *Phillips*, 438.

ERROR WILL NOT ALWAYS REVERSE.

8. *Admitting improper evidence.* A judgment will not be reversed because the court below admitted improper evidence, when, from the entire record, it is apparent that its admission had no influence on the verdict of the jury. *Kelsey* v. *Henry*, 488.

9. *Erroneous instructions.* Although it is erroneous for the court to instruct a jury what amount to find, a judgment will not be reversed for such error, when it appears from the record that the verdict could not be for a less sum, as where it rested merely in computation. *Billings* v. *Sprague*, 510.

10. This court will not reverse a judgment simply because an erroneous instruction has been given, when it is apparent that it worked no injury to the party objecting to it. *Rankin et al.* v. *Taylor et al.* 451.

11. This court will not award a new trial merely on the ground that an improper instruction was given, where it appears from the record that substantial justice has been done. *Pahlman* v. *King, Admx.* 266.

PRACTICE IN THE SUPREME COURT.

ERROR WILL NOT ALWAYS REVERSE. *Continued.*

12. This court will not disturb the judgment of the court below, for an error committed which was afterwards corrected, no injury having resulted to the party complaining. It is only in cases where errors are committed to the prejudice of the party seeking a reversal, that this court will interfere. *Ware* v. *Gilmore*, 278.

PRESUMPTIONS.

PRESUMPTIONS OF LAW AND FACT.

1. *Jurisdiction of the circuit courts—presumption in respect thereto.* See JURISDICTION, 4.

2. *As to authority of president of a bank.* See CORPORATIONS, 6.

3. *Whether an exception was taken in proper time.* See EXCEPTIONS, 2.

PRINCIPAL AND AGENT. See AGENCY.

PROCESS.

BY WHOM TO BE SERVED.

1. *When directed to a particular officer.* Under a *capias ad respondendum*, issued by a justice of the peace of La Salle county, and addressed "to any constable of said city," one P was arrested by K, as city marshal of La Salle. H entered himself as special bail, and afterwards, judgment was rendered against P, and execution issued thereon against H, as provided by statute; whereupon, he filed a bill in chancery to enjoin the levy of the execution, on the ground that, under the writ, the marshal had no authority to make the arrest *Held*, that H was entitled to the relief sought. The writ being addressed *only* to a constable, no authority was conferred upon the marshal to execute it, and all his acts under it were void. *Hickey* v. *Forristal et al.* 256.

SENDING PROCESS TO FOREIGN COUNTY.

2. *Mode of questioning the jurisdiction of the person, in such cases.* See ABATEMENT, 1, 2.

3. *In what county a contract is made.* See CONTRACTS, 9.

RETURN OF TWO NIHILS.

4. *Equivalent to service of scire facias to foreclose a mortgage.* See MORTGAGES, 5.

PURCHASERS.

PURCHASER WITH NOTICE.

1. *From an agent who has defrauded his principal.* Where an agent, in the purchase of property from his principal, conceals facts within his knowledge which it was his duty to disclose, and afterwards sells

PURCHASERS. PURCHASER WITH NOTICE. *Continued.*

the property to a third person, who has full knowledge of the fraud so practiced by the agent, such subsequent purchaser will hold subject to the rights of the principal as they existed between him and his agent. *Norris et al.* v. *Tayloe*, 18.

PURCHASER FROM EQUITABLE OWNER OF LAND.

May maintain a bill against a fraudulent holder of the legal title. See TRUSTS AND TRUSTEES, 4.

TRUSTEE CAN NOT PURCHASE THE TRUST FUND. See TRUSTS AND TRUSTEES, 6.

RAILROADS.

CONSOLIDATION OF RAILROADS.

1. *Construction of the act of February 10th, 1853—incorporating the Rockton & Freeport R. R. Co.—power of the company to consolidate its stock with, and place the same under the control of a corporation of another State.* Under the act of the legislature of February 10th, 1853, incorporating the Rockton & Freeport Railroad Company, said company was authorized, in event it should consolidate its stock with that of a corporation outside of this State, as it was empowered to do, to place the consolidated stock under the control of the board of directors of the foreign company. *Racine & Mississippi Railroad Co.* v. *The Farmers' Loan & Trust Co. et al.* 331.

2 *Effect of a corporation of this State consolidating with one of a foreign State.* The consolidation of the stock of a railroad company created by the laws of Wisconsin, with that of one created by the laws of this State, does not constitute the corporations thus consolidating one corporation of both States, or of either, but the corporation of each State continues a corporation of the State of its creation, although the same persons, as officers and directors, manage and control both corporations as one body. Ibid. 331.

3. *Mortgage made by the company created by the consolidation, upon the property of the Illinois corporation—is the deed of the latter—and is valid.* And where, after such consolidation, by legislative act, the name of the Illinois corporation is made the same as that of the Wisconsin corporation, and a mortgage is made in the corporate name, by the officers of the company as consolidated, upon the line of railroad of the Illinois corporation, such mortgage is the sole mortgage of the Illinois corporation, and is legal and valid. Ibid. 331.

4. And where, after the consolidation of these corporations, the corporation thereby created, afterwards consolidated with another Illinois corporation, the name of which was subsequently changed, by legislative act, to the same name as that of the former corporation, and

RAILROADS. CONSOLIDATION OF RAILROADS. *Continued.*

the whole managed by a common board of directors, and a mortgage was made covering the entire road in Illinois, owned by the Illinois corporation: *Held*, that notwithstanding the consolidated contract with this third corporation may have been illegal, that fact could not affect the validity of the mortgage as to that portion of the property mortgaged, and not owned by such third corporation, at the time of the consolidation. *Racine & Mississippi Railroad Co.* v. *The Farmers' Loan & Trust Co. et al.* 331.

5. *Corporations of different States—consolidating—effect of mortgage—made by the consolidated company—upon the property of either.* Where corporations, created respectively by the laws of Wisconsin and Illinois, consolidate, but in making the contract of consolidation, they fail to pursue the terms of their charters, and subsequently, by legislative act of this State, such contract is confirmed, the corporate existence of the corporation named in the act is thereby recognized as a corporation of this State, and a mortgage subsequently made in the corporate name of all the corporations, (they being the same in both States, and managed by a common board of directors) upon the property of the corporation of this State, is a valid mortgage of the latter corporation. Ibid. 331.

6. *Concerning the act of February*, 1857—*confirming the acts of consolidation between certain railroads.* And by the act of February 14, 1857, confirming the consolidation before then entered into between the Savanna Branch Railroad Company and the Racine & Mississippi Railroad Company, the corporate body which was organized in accordance with the act of consolidation, became legal, notwithstanding such organization may have been irregular. *Mitchell et al.* v. *Deeds*, 417.

DELIVERY OF GRAIN—AT WHAT PLACE.

7. *Of the rule at common law, and under the act of* 1867. Under section 22 of the act of February, 1867, entitled "Warehousemen," railroad companies are positively inhibited from making delivery of any grain which they have received for transportation, into any warehouse other than that into which it is consigned, without the consent of the owner or consignee thereof. *Vincent et al.* v. *Chicago & Alton Railroad Co.* 33.

8. And independent of the statute, the duty to make a personal delivery to the consignee, in cases where such delivery is practicable, is required by the common law. Ibid. 33.

9. And the common law rule, requiring common carriers by land to make personal delivery to the consignee, has been so far relaxed, as regards railways, *from necessity*, as in most cases to substitute, in place of personal delivery, a delivery at the warehouse of the company. But this is upon the ground that a railway has no means of delivery beyond its own lines. Ibid. 33.

RAILROADS. DELIVERY OF GRAIN—AT WHAT PLACE. *Continued.*

10. And in cases where a shipment of grain is made to a party having his warehouse on the line of the road by which the grain is transported, and such consignee is ready to receive it, it is the duty of the carrier to make a personal delivery to him, at the warehouse to which it is consigned. *Vincent et al.* v. *Chicago & Alton Railroad Co.* 33.

11. In cases of this character, the rule of the common law must be applied in its full force, the *necessity* not arising for its relaxation. Ibid. 33.

12. *What points are to be considered as on the line of a railway, for the purposes of personal delivery.* Where the owner of adjacent property to a railway company had, with the consent of the company, for a valid consideration, been permitted to lay down a side track, connecting with the track of the company, for the purpose of transporting to such property articles of freight, and such owner has erected thereon a warehouse, which is in readiness for the receipt of such freight, such side track is to be considered as a part of the line of the company, for the purposes of delivery under this statute. Ibid. 33.

13. *In what cases only—the company will be excused from delivery.* In such cases, a personal delivery must be made at a warehouse on the line of such side track, the same as if the warehouse stood upon a side track owned by the company; and the company have the right to send its cars over such track, for the purposes of delivery, until forbidden by the owner, when it will be excused from delivery. Ibid. 33.

DISCRIMINATING CHARGES.

14. *Of the right of the company in that regard.* A railroad company, although permitted to establish its rates of transportation, must do so without injurious discrimination as to individuals. Ibid. 33.

15. And when it has fixed its rates for the transportation of grain, from any given station, on the line of its road, to Chicago, it will not be permitted, on the grain being taken there, to charge one rate for delivery at the warehouse of one person, and a different rate for delivery at that of another, both warehouses being upon its line or side tracks. Ibid. 33.

OF NEGLIGENCE. See NEGLIGENCE, 1 to 11.

RATIFICATION.

OF CONTRACTS MADE WITHOUT AUTHORITY.

1. *What amounts to a ratification.* And where a contract is made by a person to erect a building upon premises which belong to another, and such contract is made without the knowledge or authority of the owner, the fact that such owner, after its completion, receives the

RATIFICATION. Of contracts made without authority. *Continued.*

rents and profits therefrom, does not amount to a ratification of such contract, so as to create a lien upon the premises. *McCarty et al.* v. *Carter*, 54.

Of contracts made with infants.

2. *What constitutes a ratification.* See INFANTS, 3.

REAL AND PERSONAL PROPERTY.

Of estate conveyed in trust.

1. *Whether realty or personalty.* Where, by an agreement between the parties to an undertaking, a portion were to furnish the capital, and the other parties, as agents in the joint undertaking, were to invest it in lots in the city of Chicago, to be bought and sold on speculation for their joint use and benefit, and those furnishing the capital were, at the expiration of the time to which the joint undertaking was limited, to have the capital, so furnished and invested, returned to them, together with a stipulated annual interest, which was first to be deducted from the proceeds of the undertaking, and the remainder to be equally divided among the parties so interested: *Held*, that the resulting estate, in the property so bought and sold, being an interest in the profits merely, was of the nature of personalty. *Nicoll* v. *Mason*, 358.

2. But if the lots so purchased are not sold, but, by consent of all the parties, are conveyed by the purchasing agent to one of the beneficiaries, in trust for all, by such conveyance the beneficiaries are invested with an equitable estate of inheritance, and the estate is thereby changed from its character as personalty to that of realty, and invested with all its incidents. Ibid. 358.

3. If, however, the purchasing agents, as the *cestuis que trust*, convey the land, by consent of all the beneficiaries, to one, in trust for all, expressly limiting the power of such trustee to a sale of the land and division of the profits, the character of the estate would not be changed by such conveyance, but would still remain as personal estate in the beneficiaries of the trust. Ibid. 358.

RECEIPTS.

Contradicting receipts.

Of a receipt for the premium in an insurance policy. See INSURANCE, 7.

RELEASE.

Release of surety.

Extension of time to the principal. See SURETY, 6.

REMEDIES.

DELIVERY OF GRAIN SHIPPED BY RAILROAD.

1. *Of the remedy of the party injured, where a railroad company refuses to deliver grain at the warehouse to which it is consigned—as required by act of* 1867. See INJUNCTIONS, 1.

RECOVERY OF DOWER.

2. *When the remedy is in chancery, and not in ejectment.* See DOWER, 4.

REPLEVIN.

VERDICT IN THIS ACTION.

Its requisites. See VERDICT, 2.

RESCISSION OF CONTRACTS. See CONTRACTS, 10; AGENCY, 3.

REVERSAL OF DECREE.

EFFECT OF A MODIFICATION.

As a reversal. See PRACTICE IN THE SUPREME COURT, 2.

RIGHT OF ACTION.

MUST ACCRUE BEFORE SUIT BROUGHT. See ACTIONS, 1.

RIPARIAN OWNERS.

OF THEIR BOUNDARIES.

1. *And right of enjoyment.* Where certain lots bordering on the Chicago river were granted to a party, by the government, and no reservation was made in such grant whereby the grantee was confined to the water's edge, in such case, the title of the owner extends to the thread or central line of the stream, and he has the right to erect and maintain wharfs and docks on its bank, and use and enjoy it in every legal manner, provided, he does not obstruct navigation, or impair the rights of others. *City of Chicago* v. *Laflin et al.* 172.

2. And where the owner of a lot bordering upon the Chicago river, whose boundaries extended to the thread of the stream, erected wharves thereon, in such position, that at the time of such erection they were not an obstruction to navigation, it was held, the city had no power to so change the channel of the river as to render the wharves an obstruction, and then require their removal without compensation. Ibid. 172.

3. And in such case, where the owners of such lots had erected docks thereon, and enjoyed the use of the same for a period of over twenty-five years, without complaint or interruption from any source, even if they were not riparian proprietors, and their boundaries did not extend beyond the water's edge, after such long acquiescence, the corporate authorities of the city can not declare them a nuisance, which, if they are a nuisance, have become so by the act of the city. Ibid. 172.

RULES OF PRACTICE.

WHETHER REASONABLE. See PRACTICE IN THE SUPERIOR COURT OF CHICAGO.

SALES.

DELIVERY OF PERSONAL PROPERTY.

1. *What constitutes.* M & W gave to the Union National Bank a warehouse receipt, undertaking to deliver certain personal property on its order. This receipt the bank assigned to K & Co., to and for whom M, (one of the firm of M & W,) pointed out and separated from the common mass in the store, the articles covered by such receipt; and at the request of K & Co., who then and there took a list of the articles, M assented to take charge of them for K & Co. until called for by their order: *Held*, in an action of replevin by K & Co. against M & W, to recover the property, that the transaction must be regarded as an acknowledgment of ownership in K & Co., and as an actual delivery to them, entitling them to the possession. *Moser et al.* v. *Kreigh et al.* 84.

ACCEPTANCE OF PART BY PURCHASER.

2. *Of his right to reject the residue, of inferior quality.* G made a contract with H & B, by the terms of which G sold to them, at a specified price, a quantity of wheat, by sample, to be delivered at a future time, and to be of the same quality of the sample. Upon the delivery of the first load, H inspected it, and remarked that "it would do," but on the arrival of the other loads, they were examined by both H and B, and refused, as not being equal to the sample, and thereupon G sold the grain to other parties: *Held*, in an action against H & B, to recover for the non-performance of the contract, that the declaration by H, upon the examination of the first load, that "it would do," could only be regarded as an admission that the wheat filled the sample to the extent of such load; that they were not thereby concluded as to the whole purchase, and had the right to reject the other loads if they were not equal to the sample. *Hubbard et al.* v. *George*, 275.

PLEDGE OF PERSONALTY—OF THE TITLE.

3. *In the hands of a third person.* When a party sells goods to another, and delivers them, though under circumstances which would authorize him to rescind the sale as against the vendee, yet if, before its rescission, the purchaser pledges them to an innocent party, as security for an advance of money, such party will hold them, as against the first vendor. *Ohio & Mississippi Railway Co.* v. *Kerr et al.* 458.

JUDICIAL SALES.

4. *Rule of caveat emptor applies.* M filed a bill in chancery, against the heirs of K, to enjoin the collection of certain notes which he had given upon the purchase of real estate sold by a commissioner under a proceeding in partition, until the determination in his favor of an action

SALES. JUDICIAL SALES. *Continued.*

of ejectment for the premises, which he had brought against A, the bill alleging that K, in his lifetime, fraudulently obtained the property from A, who was then, and at the time of the sale, in the possession of the same, claiming it as his own, but contained no allegation charging upon the defendants any knowledge of the alleged fraud or improper conduct. *Held*, that the action of the circuit court, in dismissing the bill, was proper, there having been neither fraud nor warranty in the sale. In such cases, the rule of *caveat emptor* applies, and the purchaser acts at his peril. *McManus* v. *Keith et al.* 388.

5. *Inadequacy of price.* This court has repeatedly said, that where lands are sold for an inadequate price, that, of itself, is not sufficient cause to set aside the sale, unless it is so grossly inadequate as to establish fraud. *Comstock et al.* v. *Purple et al.* 159.

6. Where, on a sale of lands made by the master in chancery, under a decree in partition, the order of the court directing such sale, was in every particular faithfully complied with, and all the proceedings were conducted with the utmost fairness, such sale will not be disturbed, even though the lands were worth one hundred per cent. more than the sum actually bid for them, and for which they were sold. Ibid. 159.

7. At judicial sales, property is not expected to sell for its full value, and mere inadequacy of price will not justify the court in setting aside the sale, the order of the court directing such sale having been faithfully observed, and no fraud being shown. Ibid. 159.

8. *Of master's sales—manner of conducting them—reporting biddings to the court.* The practice is, in sales made by a master in chancery, if the decree of the court does not otherwise direct, to strike the property off to the highest bidder, and it has not been usual to report bids to the court. And where the purchaser complies with all the terms of the sale, it is not usual for the court to refuse to confirm it, unless fraud, accident, mistake, or some great irregularity, calculated to do injury, has occurred. Ibid. 159.

9. *Former decision.* The case of *Dills* v. *Jasper*, 33 Ill. 262, is not considered in harmony with previous decisions of this court, or the practice in this State on that subject. Ibid. 159.

SCHOOLS AND SCHOOL FUNDS.

PAYMENT OF SCHOOL DEBTS.

1. *Division of districts.* School District No. 2 was divided, and a new district formed, known as District No. 6. After the division, district 6 contracted a debt for school purposes, and subsequently the two were consolidated into one district, known as District No. 2. Afterwards, a re-division of this consolidated district was made, and District No. 5 was re-organized with all its former territory: *Held*, in an action

SCHOOLS AND SCHOOL FUNDS. PAYMENT OF SCHOOL DEBTS. *Continued.*

against District No. 2, for the debt contracted by No. 6, that the defendant could not be held liable, it appearing that District No. 2 never received any benefit therefrom, but that the debt was made by District No. 6, for its own use; that at the time of the commencement of the suit, District No. 6 existed as a separate school district, and that upon the re-division of the consolidated district, no apportionment of the property, funds and liabilities had been made by the trustees, as required by the statute, whereby the payment of the debt had fallen upon District No. 2. *School Directors* v. *Miller*, 494.

2. Where a school district is divided and a new one formed, the statute requires that the township trustees shall make a division of the property, funds and liabilities, in a just and equitable manner, and until such division is made, each district is bound to pay its own debts. Ibid. 494.

SCIRE FACIAS.

FORECLOSURE BY SCIRE FACIAS. See MORTGAGES.

SHERIFFS' DEEDS.

WITHIN WHAT TIME THEY MUST BE EXECUTED.

1. Although the statute requires a sheriff, on presentation of the certificate of purchase of land sold under execution, to make a deed to the holder thereof, if the land be not redeemed, yet such presentation must be made within a reasonable time, and that reasonable time must be considered as the time in which the judgment is a lien, adding thereto the fifteen months allowed for redemption. *Rucker* v. *Dooley et al.* 377.

2. If the application for a deed be made after the eight years and three months have elapsed, and within twenty years, the same must be made through the court from which the execution issued, by a rule upon the sheriff to show cause, and on notice to parties interested, as intermediate purchasers from the judgment debtor or otherwise. Ibid. 377.

3. But the court would be inclined to hold, in analogy to the statute of limitations, and for the protection of purchasers for a valuable consideration, without notice of any lien, from the judgment debtor or those claiming under him, that after the lapse of twenty years a sheriff's deed should not be executed to the holder of a certificate of purchase not under legal disabilities, on the application of the holder to the sheriff, or by any rule or order of court upon him for such purpose; that such lapse of time should be considered an insuperable bar to its execution. Ibid. 377

SHERIFFS' DEEDS. WITHIN WHAT TIME THEY MUST BE EXECUTED. *Continued.*

4. In this case, a sheriff's deed was executed on the application to the sheriff by the holder of the certificate, twenty-nine years after the sale on execution. In the intervening time the judgment debtor sold and conveyed the land, the title passing, by several subsequent conveyances, to a remote purchaser, for a valuable consideration, and without notice of any lien, and who entered into possession before the sheriff's deed was made. It was *held*, the sheriff was not warranted in making the deed, after such a lapse of time, and it was set aside as a cloud upon the title of the party in possession. *Rucker* v. *Dooley et al.* 377.

SOLDIERS' BOUNTIES.

MUNICIPAL TAXATION THEREFOR. See TAXES, 11, 12.

STAMP ACT.

NOT APPLICABLE TO STATE COURTS.

1. Instruments are not required to be stamped to be evidence in the courts of this State. And no unfavorable inference can be drawn against the party offering such unstamped instrument, by reason of the want of a stamp. *Hanford* v. *Obrecht*, 146.

STATUTES

CONSTITUTIONALITY.

1. *Of the rule of construction.* See CONSTITUTIONAL LAW, 1.

2. *Taxation of national bank shares—under act of June* 13, 1867. Constitutionality of the act decided in *McVeagh* v. *City of Chicago et al.* 318. See TAXES, 1.

STATUTES CONSTRUED.

3. *Married women—where parties were married in another country subsequent to passage of act of* 1861, *and afterwards removed to this State.* Act of 1861 construed in *Dubois* v. *Jackson*, 49. See MARRIED WOMEN, 2, 3.

4. *Married women—of a note payable to a married woman—whether it belongs to her husband.* Effect of the act of 1861 upon the common law rule. *Snider* v. *Ridgway*, 522. See same title, 5.

5. *Witnesses—when husband and wife may testify for or against each other.* Act of 1867 construed in *Phares* v. *Barbour*, 371. See WITNESSES, 2, 3.

6. *Of a party as a witness—the other party being dead.* Act of 1867 construed in *Jacquin* v. *Davidson*, 82. See same title, 1.

7 *Joinder of count for dower with other counts.* Ninth section of the statute of ejectment construed in *Ringhouse* v. *Keever*, 470. See EJECTMENT, 1.

STATUTES. STATUTES CONSTRUED. *Continued.*

8. *Ejectment—recovery must conform to the declaration.* The seventh and twenty-fourth sections of the ejectment act construed in *Hardin et al.* v. *Kirk*, 154. See EJECTMENT, 8.

9. *Ejectment—consolidation of actions.* The ninth section of the ejectment act construed in the same case, 153. See same title, 6.

10. *Warehouses—railroads—duty of railway companies to deliver grain at the warehouse to which it is consigned.* Act of 1867, on that subject, construed in *Vincent et al.* v. *Chicago & Alton Railroad Co.* 33. See RAILROADS, 7 to 13.

11. *Mechanics' lien—owner of less estate than the fee—to what extent he can create a lien on the land.* The seventeenth section of the chapter in Rev. Stat., entitled "Liens," construed in *McCarty et al.* v. *Carter*, 53. See LIENS, 1, 2.

12. *Taxation to pay bonds issued by a town, to soldiers for bounties.* Act of January 18, 1865, construed in *Johnson et al.* v. *Campbell et al.* 316. See TAXES, 12.

13. *Judgment for taxes—at what term of the county court it may be rendered.* The statutes on that subject construed in *Stilwell et al.* v. *The People*, 45, and *The People ex rel.* v. *Nichols*, 517. See TAXES, 13, 14, 15.

14. *Liability of cities for injury received from an unprotected excavation in a street.* A city charter construed, in which it was provided the city should not be liable for neglect to *repair* its streets, until notice was given. *City of Springfield* v. *Le Claire*, 476. See HIGHWAYS, 4.

15. *Assessment of damages on dissolution of injunction—when suggestions in writing not necessary.* Act of 1861, on that subject, construed in *Shaffer* v. *Sutton*, 506. See INJUNCTIONS, 4, 5.

16. *Widow renouncing will of her husband—extent of her claim to the personalty.* The forty-sixth section of the Statute of Wills, and the tenth section of the Dower act, construed in *McMurphy* v. *Boyles et al., Exrs.* 110. See WILLS, 1, 2, 3.

17. *Pauper act—liability of counties to pay for medical aid to persons falling sick, without means, but not paupers.* The fourth section of the Pauper act construed in *Board of Supervisors of La Salle County* v. *Reynolds*, 186. See PAUPERS, 1.

STATUTE OF FRAUDS.

PAROL PROMISE TO GIVE A LEASE FOR LIFE.

1. *Without consideration.* A parol promise, founded upon no consideration, made by the owner of lands, to give or lease the same to another for life, is void, being within the statute of frauds. *Holmes et ux.* v. *Holmes*, 31.

STATUTE OF FRAUDS. *Continued.*

WHO MAY PLEAD THE STATUTE.

2. A stranger to an agreement can not object, that because it was not in writing, it is, therefore, void, under the statute of frauds. This statutory defense is personal, and can not be made by persons who are neither parties nor privies to the agreement. *Chicago Dock Co.* v. *Kinzie*, 289.

SUBROGATION.

SUBROGATION OF SURETY.

To other security for a debt which he has to pay. See SURETY, 2.

SUBSCRIPTION.

TAXATION TO REFUND SUBSCRIPTIONS.

Where money has been raised by subscription, to pay bounties to soldiers, in anticipation of a tax. See TAXES, 11, 12.

SUPERIOR COURT OF CHICAGO.

PRACTICE THEREIN. See PRACTICE IN THE SUPERIOR COURT OF CHICAGO.

SURETY.

LIABILITY UPON AN INJUNCTION BOND.

1. *Extent thereof.* In case of an injunction restraining the collection of a promissory note, where the bond is conditioned for the payment of the debt, the liability of the surety therefor becomes fixed, upon the dissolution of the injunction, and a recovery may be had against him, in an action upon the bond. *Billings* v. *Sprague*, 509.

SUBROGATION OF SURETY.

2. And where, in such suit, the note enjoined is secured by a deed of trust, and the bond provides for its payment in event the injunction is dissolved, the surety, when he shall have paid the debt, will be substituted in equity to the lien under the trust deed. Ibid. 509.

OF A MORTGAGE TO THE CREDITOR.

3. *It enures to the benefit of the surety.* The principle is well settled, that where a mortgage is taken by a creditor from the principal debtor, as a further security for his debt, the mortgage so taken must be held in trust, not only for the benefit of such creditor, but for the surety's indemnity. *Phares* v. *Barbour*, 370.

4. *Creditor becomes a trustee as to the property mortgaged, and must deal with it in good faith.* In such case, the creditor becomes a trustee as to the mortgaged property, and this relation imposes it as an obligation upon him to act in good faith towards his *cestui que trust*, in dealing with the fund, and hold it fairly and impartially, for the benefit of the surety, as well as for himself. Ibid. 370.

SURETY. Of a mortgage to the creditor. *Continued.*

5. And if the creditor parts with the property so mortgaged, without the knowledge or against the will of the surety, or does any act in violation of the trust, or omits to perform any duty which this relation imposes, whereby the surety is injured, he must be held to account for its full value. *Phares* v. *Barbour*, 370.

Release of surety. *D*

6. *Extension of time to principal.* When the payee of a note gives time or forbearance to the principal debtor, by a promise binding in law, without the knowledge or consent of the surety, the latter is discharged. Ibid. 370.

SURFACE WATERS.

Rights of the servient and dominant heritage.

1. The owner of a servient heritage has no right, by embankments or other artificial means, to stop the natural flow of the surface water from the dominant heritage, and thus throw it back upon the latter. *Gillham* v. *Madison County Railroad Co.* 484.

TAXES.

Taxation of national bank shares.

1. *Under act of* 1867. The provision of the act of June 13, 1867, requiring the assessment of shares in banks to be made for the year 1867, with regard to the ownership and value of such shares on the first day of July, 1867, instead of the first day of the preceding April, does not violate the principle of equality and uniformity established by the constitution. *McVeagh* v. *City of Chicago et al.* 318.

2. But if, in making an assessment under that act, the valuation of the shares was determined on the first day of July, and the law required it should be determined as of the first day of April, it would be necessary for the owner of the shares, calling upon a court of equity for relief, to show that he has been injured thereby—that by reason thereof, the valuation put upon them on the first day of July was greater than they justly bore on the first day of April preceding, or that he was compelled to pay a double tax, first on the money listed for taxation on the first day of April, and again on the bank shares he purchased with this same money between that day and the first day of July. Ibid. 318.

3. In assessing the shares in national banks under State authority, it is not necessary that they shall be included in the list of other personal property, so that upon aggregating the personal property, shares included, the taxable portion would be shown by what remained after the deduction for debts was made, as provided by the general revenue law. It is quite immaterial on what portion of the list these shares are found. Ibid. 318.

TAXES. TAXATION OF NATIONAL BANK SHARES. *Continued.*

4. Under the act of 1867, a system of taxation for bank shares was designed, peculiar to itself, and independent of the general revenue system of the State. The only deduction allowed by the act, from the shares of each owner, is a proportionate sum for the real estate in which a portion of the capital might be invested. No deduction for debts owing by the owner can be made from the valuation of his bank shares. *McVeagh* v. *City of Chicago et al.* 318.

5. Nor is this discrimination in not allowing a deduction from the valuation of bank shares, for debts owing by the owner, as is allowed to be made from the valuation of other personal property under the general revenue law of the State, contrary to the limitations imposed by the proviso of the 41st section of the national banking act of June 3, 1864, which provides that shares in those banks shall not be taxed under State authority "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such States." The "rate" of taxation is not affected by the different modes adopted to ascertain the taxable value of the various kinds of property. Ibid. 318.

6. Should a collector be compelled to sell the bank shares for the non-payment of taxes, under the act of 1867, and the bank refuse to transfer them to the purchaser on the books of the bank, a court of chancery, on a bill filed for such purpose, would compel the transfer. Ibid. 318.

7. Or if the taxes upon such shares remain unpaid through the dividends, as provided by this law, the State could by *mandamus* compel the officers of the bank to appropriate the dividends, or such portions as might be necessary to pay the taxes. Ibid. 318.

OF PROPERTY OMITTED FROM TAXATION.

8. *Power of the legislature to provide for its subsequent assessment.* Where a particular species of property has been omitted from taxation for a given year, the legislature have the power to pass a special law to cure the omission. Ibid. 318.

9. So, the tax on national bank shares not having been legally assessed for the year 1867, by reason of the defective law under which it was attempted, the act of June, of that year, was designed to supply the omission, and there was no want of constitutional power to enact it. Ibid. 318.

NOTICE OF ASSESSMENT.

10. *What is required by act of* 1867. No actual notice of the assessment of bank shares is required to be given to the owner, the act requiring only that notice shall be published in a newspaper a certain length of time. Ibid. 318.

TAXES. *Continued.*

TAXATION TO PAY SOLDIERS' BOUNTIES.

11. *Refunding money raised by subscription in anticipation of the levy of a tax.* While the legislature can not authorize taxation, in order to raise money to be used for purposes which can not reasonably be considered corporate, yet it has the undoubted power to authorize taxation for the purpose of refunding money raised to pay bounties to volunteers, and which was raised by subscription, on the faith that the money so advanced for such purpose would be refunded. *Johnson et al.* v. *Campbell et al.* 316.

12. *Act of January 18th, 1865—authorizing taxation to pay bounties to volunteers.* The act of January 18, 1865, authorizing taxation for the payment of bounties to volunteers, recognizes, as a binding debt, the bonds which a town may have issued to volunteers in payment of bounties and in lieu of money, the same as the fund raised by subscription for such purpose, and authorizes taxation for their payment. Ibid. 316.

JUDGMENT FOR TAXES.

13. *At what term of the county court it may be rendered.* The county court has jurisdiction to render judgment against delinquent lands, for taxes, at any regular term after April in each year, for the taxes of the preceding year, on legal and proper notice. The statute has not limited the rendition of judgment to the first Monday of May; nor does the statute, in terms, require that it shall be at that or any specified term. *Stilwell et al.* v. *The People*, 45.

14. *Dismissal at one term—no bar to a judgment at a subsequent term.* Where application was made for judgment against the delinquent list of lands at the June term of the county court, and the court refused to enter judgment because the list had not been filed five days, and a new application was made to the next August term: *Held*, that the refusal at the June term, not having been on the merits, formed no bar to rendering judgment on the second application. Ibid. 45.

15. In counties adopting township organization, application for judgment against delinquent lands, and for an order of sale, may be made to the county court at the July term. The collector is not compelled to make it at the May term. *The People ex rel. Shank* v. *Nichols*, 517.

16. *Where a portion of the assessment is illegal.* Where a portion of an assessment is illegal, but the tax is so levied that the legal can be separated from the illegal, judgment may be rendered for the taxes legally assessed. Ibid. 517.

17. So, where a board of supervisors, in equalizing the assessments in the county, increased the valuation of improved lands in one of the townships, without at the same time increasing the valuation of the

TAXES. JUDGMENT FOR TAXES. *Continued.*

unimproved lands in the same township, so that the order of the board of supervisors in that regard was illegal and void, on an application for a judgment against the lands for unpaid taxes, a judgment could be rendered for an amount according to the assessment as it stood before the same was increased by the board of supervisors, and for a sum less than that named in the collector's notice. *The People ex rel. Shank* v. *Nichols*, 517.

EQUALIZING ASSESSMENTS.

18. *Of the proper basis thereof.* The only power the board of supervisors have over the assessment rolls is to ascertain if the valuation in one town or district bears a just relation to all the towns and districts in the county, and if it does not, the statute authorizes the board to increase or diminish the aggregate valuation of the real estate in any town or district, by adding or deducting such sum, upon the hundred, as may, in their opinion, be necessary to produce such relation. And in order to effect this just relation, the board must include unimproved as well as improved lands. Ibid. 517.

TENANTS IN COMMON.

OF THEIR RELATIONS WITH EACH OTHER.

1. *Incumbrances removed from the common estate by one—other tenant must contribute to extent of his interest—of the lien for such contribution.* A and B were owners, as tenants in common, of a certain tract of land incumbered by a mortgage, which was foreclosed and the premises purchased by one C, who assigned the certificate to A. D, the mother of B, having a right of dower in an undivided half of the premises, and being also guardian of B, redeemed the same by paying over to the master the full amount of the purchase, which sum was paid to A. In a suit for partition, by A against B and D: *Held*, that A must take her allotment, subject to D's lien for the payment of one-half of the redemption money. *Titsworth et al.* v. *Stout*, 78.

2. That D, having redeemed the premises from the master's sale, had a valid claim against A to the extent of one-half of the redemption money paid by her, and which constituted an equitable lien on the land while in the hands of A, which a court of equity would enforce. Ibid. 78.

3. Where one tenant in common removes an incumbrance from the common estate, the other tenants must contribute to the extent of their respective interests, and to secure such contribution, a court of equity will enforce upon such interests an equitable lien of the same character with that which has been removed by the redeeming tenant. Ibid. 78.

TENANTS IN COMMON. Of their relations with each other. *Continued.*

4. *Of the purchase of an outstanding title by one tenant—rights of his co-tenant.* And where one tenant buys in an outstanding title, he can not set it up as against his co-tenant without giving him an opportunity to contribute and thereby participate in the benefit of such purchase. *Titsworth et al.* v. *Stout*, 78.

TRESPASS.

In trespass against an officer.

Whether the legality of his appointment can be inquired into. See PLEADING AND EVIDENCE, 1.

TRUSTS AND TRUSTEES.

When a trust exists.

1. *And of the enforcement of trusts by courts of equity.* Where a policy of insurance on the life of the assignor, was voluntarily assigned by him to a trustee, for the benefit of his three children, notice of which assignment and trust was given to the company, and also to such trustee, who sent to the assignor his written acceptance thereof, but the policy and assignment remained in the possession of the assignor, and was found after his decease among his other papers: *Held*, in a suit by the trustee against the administrator of the assignor, to compel a surrender of the policy to him as such trustee, and that he be declared the owner thereof:

1st. That an actual delivery of the policy and assignment thereof to the trustee was not necessary in order to complete the trust created.

2d. That the acts of the parties—the one notifying the other of the assignment and trust, and his written acceptance thereof—constituted a sufficient delivery to complete the title of the trustee.

3d. That the object sought to be accomplished by the assignor in making the assignment, namely, to make provision for his orphan children, being fully established, equity will carry out such intention, though the transfer be voluntary and without consideration—he never having manifested any desire to retract the act. *Otis et al.* v. *Beckwith et al.* 121.

2. *Intention of parties—a controling element.* In such cases, equity will look to the substance of the act done, and the intention with which it was done, and in the absence of fraud, carry out such intention and give it full effect. Ibid. 121.

3. *Of a title fraudulently obtained.* Where a person entitled to a soldiers' bounty land warrant, employed another to obtain the warrant for him, and the person so employed, by fraudulent means, procured the land to be located, under the warrant, in his own name, he will hold the title as a trustee for the rightful owner. *Smith* v. *Wright et al.* 403.

TRUSTS AND TRUSTEES. *Continued.*

WHO MAY ENFORCE SUCH A TRUST.

4. *Of purchasers.* A purchaser of the land thus situated, from the equitable owner thereof, may maintain a bill against the party who obtained the title fraudulently, and those claiming under him, who are not innocent purchasers, and for a valuable consideration, for the purpose of establishing the fraud, and enforcing the trust in his favor. *Smith* v. *Wright et al.* 403.

WHO CONSIDERED A TRUSTEE.

5. Where a person takes the management of a railroad which is mortgaged, for the better security or protection of the mortgagee, such person thereby becomes a trustee, not only for the mortgagee, but also for the mortgagor. *Racine & Miss. Railroad Co.* v. *The Farmers' Loan & Trust Co. et al.* 332.

TRUSTEE CAN NOT PURCHASE TRUST FUND.

6. And if, at a foreclosure sale of the property under a second mortgage, such person, while occupying such relation, becomes the purchaser, he will be required to yield the property to the mortgagor corporation, upon being reimbursed the amount of his bid, with interest thereon. Ibid. 332.

TRUSTEE PURCHASING AT HIS OWN SALE.

7. A trustee, employed to sell trust property, can not, either directly or indirectly, become a purchaser at his own sale. *Phares* v. *Barbour*, 371.

SURETY AND CREDITOR.

8. *Of a mortgage to the creditor—he holds the mortgaged property in trust for the surety.* See SURETY, 2.

CONVEYING LAND TO PAY DEBTS.

9. *Liability of trustee to creditors.* G conveyed to B certain lands, with the power to sell them and apply the proceeds in the payment of G's debts. B sold the lands, and, to the extent of the proceeds received, applied them in payment of G's debts: *Held*, in an action against B, by a creditor of G, whose claim had not been paid, that B could not be held liable for a misapplication of the funds, there being no proof that B, on receiving the deed, had agreed with G to pay this claim as a preferred debt. *Becker* v. *Williams*, 208.

LAPSE OF TIME.

10. *Its effect.* A court of chancery will not, after a long lapse of years, interfere to reform a deed or declare a trust, except upon the most positive and satisfactory evidence of the intention of the parties at the time the deed was executed or trust created. *Nicoll* v. *Mason*, 358.

VENDOR AND PURCHASER.

MEASURE OF DAMAGES.

In an action by a vendor against his vendee, for refusing to receive the property sold. See MEASURE OF DAMAGES, 5.

VERDICT.

IN ASSUMPSIT.

1. *When sufficient.* A jury returned as their verdict in an action of assumpsit: "We, the jurors in the case of Isaac Vanduzor *v.* The Hartford Fire Insurance Company, find for the plaintiff, and fix the judgment at five hundred dollars in his favor." *Held*, that this was sufficient in substance, and that the court might have reduced it to form; and that under the statute of amendments and jeofails, it must be treated as amended and reduced to form. *Hartford Fire Ins. Co.* v. *Vanduzor*, 489.

VERDICT IN REPLEVIN.

2. *Its requisites.* In an action of replevin, the pleas were—1st, *non cepit*; 2d, property in the defendant; 3d, property in third person, and 4th, justification of the taking under an execution against such third person. The verdict was, under the direction of the court, "We, the jury, find the defendant not guilty, and the right of special property to be in the defendant." *Held*, that this was error. The verdict, in such case, should have been, We, the jury, find the issue for the defendant; that the property was the property of the party defendant in the execution. *Hanford* v. *Obrecht*, 147.

FORM OF THE VERDICT.

3. *Within the control of the court.* Generally, the form of a verdict is within the control of the court. *O'Brien* v. *Palmer*, 72.

4. So, in an action of assumpsit, for the purchase price of certain property, one point of controversy was, as made by the pleadings, whether the defendant was obliged to deliver up to plaintiff five certain notes executed by him to defendant, on a previous purchase of the same property from defendant, and the jury returned a verdict as follows: "We find the issues for the plaintiff, and assess his damages at $4,396.65, and we find that the plaintiff is entitled to the possession of the five certain promissory notes in the proceedings mentioned, and produced upon the trial by the defendant:" *Held*, that it was not error for the court, of its own motion, to reject the latter portion of the verdict as surplusage, and render judgment simply for the money part. Ibid. 72.

SEALING A VERDICT AND SEPARATION OF THE JURY.

5. *Power of the court in reference thereto.* See PRACTICE, 10, 11.

WAIVER.

WAIVER OF FORFEITURE OF LEASE.

By accepting rent. See LANDLORD AND TENANT, 5, 6.

WAREHOUSES.

DELIVERY OF GRAIN SHIPPED BY RAILROAD.

Of the duty of railway companies to deliver grain to the warehouse to which it is consigned—under act of 1867. See RAILROADS, 7 to 13.

WARRANTY.

IMPLIED WARRANTY.

1. Where the owner of a lumber yard adjacent to a railroad, in making sale of the lumber yard, professes to sell the superstructure of a side railway laid upon the street, there is an implied warranty of title as to such side railway. *Woodruff et al.* v. *Thorne et al.* 88.

WIDOW.

RENUNCIATION OF WILL OF HUSBAND.

Extent of widow's claim to the personalty. See WILLS, 1, 2, 3.

WILLS.

WHERE A WIDOW RENOUNCES THE WILL OF HER HUSBAND.

1. *Extent of her claim to the personalty.* A husband died testate, leaving a widow, but no children or lineal descendants, and provided, in his will, that the income of one-half of his personal estate should be paid to his widow during her life, and at her death should be distributed among his collateral kindred, and bequeathed the other half to various persons. The widow renounced the will, and set up claim to the entire personal estate: *Held*, that in such case, the widow was only entitled to one-third of the personal property remaining after the payment of debts, in addition to the award of specific property. *McMurphy* v. *Boyles et al. Exors.* 110.

2. By the widow's renunciation of the will, the property of her husband is not thereby converted into an intestate estate. The will remains, notwithstanding she declines its provisions in her favor; and in such case, the 46th section of the statute of wills, which applies only to intestate estates, has no application. Ibid. 110.

3 The phrase, "her share in the personal estate of her husband," which occurs in the 10th section of the dower act, must be understood as intending to give to the widow, in such case, only such share of the personal estate as shall be equal to one-third part. Ibid. 110.

WITNESSES.

COMPETENCY.

1. *Whether one party may testify, the other being dead—construction of act of* 1867. Under the act of 1867, in reference to the competency of witnesses, where the agent of the purchaser who made the contract for the party, testifies in the case after the purchaser has died: *Held*, that the seller of the property is a competent witness in the case. *Jacquin* v. *Davidson*, 82.

2. *Husband and wife as witnesses for or against each other.* In an action against the sureties upon a note, the wife of one of the defendants was offered as a witness to testify to what the plaintiff had told her, at the time when he called for her husband to go and see the principal debtor, and get him to execute a mortgage as a further security for the debt: *Held*, that she was incompetent. *Phares* v. *Barbour*, 371.

3. *Construction of act of* 1867. Under the act of February 14, 1867, neither the husband nor wife can be a witness, for or against the other, except in the particular cases specified in the statute. Ibid. 371.

IMPEACHING A WITNESS.

4. *Of the manner thereof.* Where the testimony of a witness is willfully and corruptly false in regard to one fact in the case, he may be regarded as impeached, not only in reference to that fact, but in reference to all other statements made by him, material to the issue and uncorroborated by other testimony. *O'Brien* v. *Palmer*, 77.*

5. A mere conflict of testimony is not what is called impeaching evidence. *Baker* v. *Robinson*, 299.

CREDIBILITY OF WITNESS.

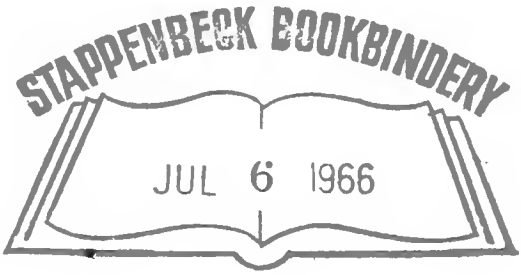
Of naming a witness in an instruction, and directing the attention of the jury to his conduct while testifying. See INSTRUCTIONS, 11.

EXAMINATION OF A WITNESS WHOSE DEPOSITION HAS BEEN TAKEN.

Whether allowable. See PRACTICE, 8, 9.

WRIT OF ERROR. See APPEALS AND WRITS OF ERROR.

*See also, *Howard* v. *McDonald*, 46 Ill. 123.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